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In the Supreme Court of the United States.

OCTOBER TERM, 1923.

UNITED STATES OF AMERICA, APPELLANT, *v.* NEW YORK COFFEE AND SUGAR EXCHANGE (Inc.), New York Coffee and Sugar Clearing Association (Inc.), et al.	No. 331.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR THE UNITED STATES.

(All italics not otherwise indicated are ours.)

PLEADINGS.

THE PETITION.

This is an action brought under that provision of the Sherman Anti-Trust Act which makes it the duty of United States attorneys, acting under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain violations of the act. The parties defendant are the New York Coffee and Sugar Exchange (Inc.), a corporation organized under the laws of the State of New York; the New York Coffee and Sugar Clearing Association (Inc.), a corporation organized under the laws of the same

State; and the officers of these corporations, who are sued both as individuals and in their representative capacity, and all the other members thereof, who were made parties defendant, not by name, but through said corporations and their officers. The petition alleges a violation of both the first or conspiracy section of the Sherman Anti-Trust Act, and those provisions of the Wilson Act of February 12, 1913, which prohibit combinations in restraint of trade when an importer is a party thereto. And the object of the petition is to prevent defendants from further engaging in and carrying out a combination and conspiracy in restraint of interstate and foreign trade and commerce in raw and refined sugar. The petition states the sources from which the United States draws its supplies of sugar, and the quantities derived from each of these several sources for the years 1920, 1921, and 1922, and describes the operations on the Exchange. (R. pp. 12–17.) It is alleged that the volume of transactions relating to refined sugar are inconsequential as compared to the dealings relating to raw sugar; that such raw sugar as is actually delivered in consequence of transactions on the Exchange is stored in bonded warehouses licensed by the Exchange corporation; that actual transactions on the Exchange in an overwhelming majority of instances do not involve, and are not intended to involve, the delivery of the amount of raw sugar purported to be sold thereby; that such transactions are completed by matching, ring settlements, or payments of differences, and by

clearing through the Clearing Association where settlements are reached by matching, payments of differences, etc.; that on an average about 75 per cent of all transactions are settled through the Clearing Association; that of the total number of contracts cleared through the Association in November, 1922, $\frac{18}{100}$ of 1 per cent were consummated by delivery; of the total number of contracts cleared in December, 1922, $\frac{23}{100}$ of 1 per cent were so consummated; of the contracts of January, 1922, $\frac{10}{100}$ of 1 per cent, and of February, 1923, $\frac{8}{100}$ of 1 per cent, and of March, 1923, $\frac{10}{100}$ of 1 per cent were so consummated; that by reason of the large number of firms and corporations with which its members are connected, or which transact their business in accordance with the rules of the Exchange, it has become the largest commercial center for transactions relating to sugar in the world; that while but little sugar is actually delivered in settlement of the numerous transactions on the Exchange, yet such transactions are regarded as binding obligations and as establishing the price of sugar for the day for the date of delivery; and the fluctuations of prices are carefully tabulated and immediately transmitted by wire to all the markets of the world, and are published in the press of the United States and of many foreign countries, and the prices thus established and published are taken by those who own and sell sugar and those who purchase sugar as the basis for prices in actual transactions; and thus by their speculations and gambling in sugar futures defendants control the prices which the

refiner pays for raw sugar, and also the prices which dealers and consumers pay for refined sugar; that the prices thus fixed are established upon a wholly speculative and artificial basis, without proper regard to the conditions which, but for said unlawful and uneconomic operations, would control said prices; and that said Exchange and Clearing Association serve no legitimate or useful purpose in the marketing in interstate and foreign commerce of raw and refined sugar, but serve only as a means of contracting and speculating with reference to supplies of sugar that in many instances do not exist, which is done for the purpose of manipulating the prices of raw and refined sugar without regard to conditions actually obtaining in the industry, and regardless of the law of supply and demand, and solely for illegitimate gambling or speculative profits. (R. pp. 12–16.)

There is then given statistics taken from recognized authorities showing the supply and estimated supply of sugar for 1920–21, 1921–22, and 1922–23, and the relative production of sugar in Cuba for 1921–22 and the estimated production for 1922–23, and the stocks on hand in the several ports of the United States on April 7–11, 1922 and 1923; and it is alleged that there is no economic justification for a sudden or appreciable increase in the prices of raw or refined sugar. (R. pp. 14–19.) A table is then given showing the prices of raw sugar for March, May, July, and September deliveries, 1923; from February 1 to April 16, 1923; and also a table showing quotations of refined sugar by five refineries

situated in New York on February 1, 8, 15, March 15, 27, 29, and April 5 and 12, 1923; and it is then alleged that the rapid increases there shown in the prices of sugar were the direct result of a combination and conspiracy between the two corporations mentioned and the officers and members of those corporations and their clients or principals, who, by means of reported purchases and sales of sugar, sought to and did establish artificial and unwarranted prices not governed by the law of supply and demand, but based wholly on speculative dealings, not involving the delivery of the quantities of sugar represented thereby, but carried on for the purpose and with the effect of unduly enhancing the prices of sugar. (R. pp. 19–21.) It is further alleged that since February 7, 1923, there has been an orgy of speculation in raw sugar through the instrumentality of the Exchange and the Clearing Association; that enormous quantities of raw sugar, greatly in excess of the quantities customarily dealt in and more than the total stocks of raw sugar then in existence, have been the subject of fictitious or paper sales; that the transactions on the Exchange during February, 1923, though a short month with two holidays, aggregated 1,515,050 tons, as compared with 362,850 tons in January, while during February only 300 tons were actually delivered as the result of transactions on the Exchange; and that during March, 1923, transactions purporting to involve the purchase and sale of raw sugar were had on the Exchange to the extent of 937,900 tons, while de-

liveries amounted to only 1,250 tons. (R. p. 22.) Also a table is given showing for the months of November and December, 1922, and January, February, and March, 1923, the number of contracts made, open contracts from the previous month, contracts cleared through the Clearing Association, those upon which actual deliveries were made, and the contracts matched; and it is alleged that as the result of these fictitious or paper transactions the prices of raw sugar and also of refined sugar have been increased on an average of considerably more than $2.00 per hundredweight; and that the speculative operations described, and which were carried on with a common understanding and for the purpose and with the intent of unduly enhancing the prices of both raw and refined sugar, and which had accomplished that object, constitute and are an unlawful combination and conspiracy in restraint of interstate and foreign trade and commerce in raw and refined sugar, and have resulted, and will continue to result unless restrained by the court, in the continued enhancement of the prices of raw and refined sugar, and also in a diminished demand therefor, thereby lessening the traffic therein in interstate and foreign commerce. (R. pp. 23–25.) And it is prayed that it be adjudged and decreed that the by-laws, rules, and regulations of the defendant corporations, in so far as they relate to sugar, their adoption by said corporations and individual defendants, and the concerted action of said defendants in carrying out said rules and regulations,

constitute a combination and conspiracy in restraint of interstate and foreign trade and commerce in raw and refined sugar in violation of the Act of Congress of July 2, 1890, known as the Sherman Anti-Trust Law, and also of Section 73 of the Act of August 27, 1894, as amended by the Act of February 12, 1913, known as the Wilson Tariff Act, contrary to public policy and detrimental to the people of the United States and in derogation of their common right; and that defendants be perpetually enjoined from maintaining and operating, and from engaging in the operation of, the Exchange and Clearing Association in so far as they deal or purport to deal in sugar; from establishing, maintaining, operating, or engaging in the operation of any plan or scheme of like character, or designed, or intended to establish artificial prices of sugar, or to substantially affect the prices of sugar by artificial means, or the necessary result of which would be to so establish and affect the prices of sugar; that the defendants be enjoined from publishing or making public any price or prices of raw or refined sugar as being or purporting to be the market price of sugar as established by or observed in the transactions on the Exchange; and from attempting to establish the prices named in the transactions on said Exchange as the market prices of sugar to be observed in bona fide transactions actually involving the purchase, sale, and delivery of sugar; and that they be also enjoined from entering into or permitting to be entered into any transactions on the Exchange or elsewhere involving or

purporting to involve the purchase, sale, and delivery of sugar, unless the person purporting to make such sale has in his possession or under his control a supply of sugar adequate to meet the requirements of such transaction, and the person purchasing or purporting to purchase shall in good faith intend to buy and pay for such sugar and accept delivery thereof as soon as same can be made. (R. pp. 25–28.)

ANSWER.

The answer admits the organization of both corporations, but corrects some errors made in the petition with reference to the parties who are officers of and control said corporations. (R. pp. 34–35.) With reference to operations upon the Exchange and through the Clearing Association the answer contains the following important statements and admissions:

It designates two classes of transactions engaged in by the members *which are not made upon the Exchange*. Both of these classes consist of actual sales of sugar. It then describes the third class of transactions, which *are made* upon the Exchange. It says that many of the members, either in person or as brokers or agents, make with other members of the Exchange purchases and sales of coffee and sugar for future delivery, said contracts providing that the seller shall deliver in New York the coffee or sugar covered by the contract upon any date of the named month that he shall select; "*that the entire trading in said exchange room consists of making or*

transferring contracts for future delivery"; that all orders received by members to buy or sell must be executed in the open market under the Exchange rules and only during the hours for regular trading, and both the buyers and sellers are personally present in the city of New York when the contracts are made; that many of the members of the Exchange are bankers, refiners, producers, users, and manufacturers of sugar, etc., who find it to their business advantage to be members of the Exchange, but who are not active on the floor thereof, and many more of the members act only as agents and receive from others on consignment shipments of coffee and sugar to be sold by them as agents, *which they protect by future contracts on the Exchange;* and others of said members act only as agents or brokers in the making of future contracts with other members of the Exchange; and that all contracts for future delivery provide for the delivery of negotiable warehouse receipts which represent the actual commodity and are of only such warehouses as are approved and licensed by the Exchange. (R. pp. 38, 39.)

In describing more particularly the transactions upon the Exchange the answer says that in trading for future delivery in the exchange room during every year many millions of tons of sugar are bought and sold for future delivery, "*and as respects upwards of three-fourths of the sugar covered thereby, said contracts are fulfilled and settled without any delivery of any warehouse receipts, but are settled by off-sets or clearances through the Clearing Association, and*

the payment of differences in market price, or they may be settled by so-called "ring" settlements, which are provided for by the rules of said Exchange and that practically (all) said remaining future contracts are performed or completed during the months specified for delivery, by delivery by sellers to buyers of said warehouse receipts." (R. p. 40.) It is further alleged that a large part of the total volume of trading in sugar for future delivery in the exchange room as above described consists of contracts made by producers of sugar, refiners, merchants, and other consumers, "*who make such contracts entirely for the purpose of insuring themselves against price fluctuations, respecting sugar either owned, sold, or purchased by them, for the purpose of merchandising or shipping to consuming markets or refining, or using in manufactured products in which sugar is used, and that in most cases such contracts for future delivery are fulfilled by the making of counter contracts to offset the ones originally made; the actual sugar which such future contracts were based upon being sold or disposed of to refiners or others. That another large part of said future trading in said exchange room consists of contracts made by or for so-called speculators, persons who have capital and make a study of trade conditions affecting prices, and endeavor to forecast the future prices of sugar and profit thereby, through the making of such contracts for future delivery*"; that the Exchange for the information of its members and their customers gather information from all parts of the world in regard to crops and visible supply of sugar

and current prices prevailing in different sugar markets of the world; "*that a very large proportion of all the world's trading in sugar for future delivery takes place in the exchange room of the Exchange,*" but that an exchange is also maintained in New Orleans, and formerly exchanges were maintained at London, Paris, and Hamburg. (R. pp. 40, 41.)

It is also alleged that the rules of the Exchange limit the variation on any day of the price of sugar futures for any month to 1 cent per pound in the price, and the board of managers are given the power to suspend trading whenever such conditions arise that in their judgment the best interests of the Exchange will be thereby promoted, and it is asserted that the purchase and sale of sugar for future delivery upon the Exchange is a distinct benefit to all producers and consumers and those engaged in commerce in sugar and to the public in general "in that it enables carriers of sugar to protect themselves against price fluctuations by the making of 'hedging' contracts upon such Exchange"; and it is further declared that the prices prevailing in future trading at any time are the expression of the preponderance of opinion amongst interested traders as to the future course of the prices of sugar, and that they ordinarily express the normal operation of the natural law of supply and demand; and that the trading in futures in the exchange room and the operations of the Exchange "are substantially similar to those of exchanges dealing in other commodities, such as the Board of Trade of the City of Chicago, dealing in

grain; the New York Cotton Exchange, dealing in cotton; the New York Produce Exchange, dealing in grain and other produce; and that all of said exchanges, as well as this defendant, perform a great and important economic function in connection with the distribution of the products in which they deal." (R. pp. 42, 43.)

With reference to the functions of the Clearing Association, it is alleged that it "does not make any purchases or sales of coffee or sugar, and that it does not deal in coffee or sugar except as an agency in clearing contracts of members of the said Exchange and of the said Clearing Association, *and that its clearance of said contracts is simply an offsetting of contracts of certain members against the contracts of certain other members, and guarantees of performance, and that in such respect it constitutes a mere convenience, avoiding undue waste of time and effort, and affords a protection by its requirements of suitable margin to protect contracts*"; and that the only exception is that it has the power under its charter to buy or sell coffee or sugar in the market for the purpose of protecting itself against a default by a member; but that in the entire existence of the Clearing Association very few such purchases or sales have ever been made. (R. pp. 43, 44.)

In answering specifically the charges in the petition relating to the transactions on the Exchange it is said, "*They admit that transactions on the Exchange in a great majority of cases do not involve the delivery of the amount of raw sugar sold thereby*"; but they

deny that such transactions are not intended to involve the delivery of such sugar, or that such sugar is not actually sold thereby, and allege that all transactions on the Exchange contemplate the actual delivery of sugar, and that any buyer can compel its delivery. And "Defendants admit that such transactions are frequently completed on said Exchange by offsets, sometimes called matching, ring settlements, and payment of differences and by clearing through defendant, Clearing Association, where settlements are reached by offsets, sometimes called matching, payments of differences, etc., without delivery of the amount of sugar stated in the contracts," but they allege that all such settlements constitute offsets, and their validity has been established by the decisions of the Supreme Court of the United States and the Court of Appeals of the State of New York. (R. p. 48.) "They admit that on an average of upwards of 75 per cent of all transactions are cleared through defendant, Clearing Association, and that the percentages of the total number of contracts cleared through said Association for the months therein referred to are correctly stated in said paragraph IV of complainant's bill, except that the decimal point is incorrectly placed two places to the left in each of such cases. They admit that the Exchange has become and is the largest commercial center for transactions relating to sugar in the world. They admit that while but little sugar is actually delivered in consequence of the numerous transactions on the Exchange, yet the

purchases at any particular time are regarded as and are binding obligations and as establishing the price of sugar for the day for delivery at such time, and they admit that the course of the dealings, the fluctuations in prices up and down, are carefully tabulated and immediately transmitted by wire to all the markets of the world, and especially to the markets of the United States, and are published in the press of the United States and of many foreign countries"; but they say such transmittal is done by the Western Union Telegraph Company and not by defendants. (R. pp. 48, 49.) "They admit that the prices thus established and published are taken by those who own and sell sugar and those who purchase sugar as the basis for prices in actual transactions in very many cases, but they deny that there is any compulsion or obligation on such persons to take such prices as the basis for actual transactions, and they deny that they or either of them speculate or gamble in sugar for future delivery or control the prices of raw sugar paid by the refiner, or the prices of the wholesaler or jobber, or the prices of the retailer, or the prices paid by consumers throughout the United States." (R. p. 49.)

In answering the section of the petition in which the statistics relating to the condition of the sugar supply are recited the answer goes into considerable detail and undertakes to show that the actual and estimated supply of sugar, as shown by statisticians, are less than those given in the petition, and that the

conditions are more unfavorable than as indicated therein. (R. pp. 51–55.)

It is denied that the price movements for raw sugar were immediately reflected in the prices of refined sugar, but it is admitted "that the price of refined sugar, and also of 'spot' sugar, advanced contemporaneously with the advances in the price of 'futures' on the Exchange, and that the table set forth in the bill of complaint showing the refined sugar quotations of five of the principal refiners of the United States out of the sixteen or more refiners in the United States is substantially correct, and a comparison of the two tables shows that the advances over the same periods of the refiners' prices at times exceeded the advances on the Exchange of future prices"; and it is alleged that since the filing of the bill the prices of both refined sugar as fixed by the refiners and the prices of "futures" as traded in on the Exchange have contemporaneously advanced. (R. p. 56.)

The answer also admits that during February, 1923, the transactions on the Exchange aggregated approximately 1,515,050 tons, as compared with 362,850 tons in January, and that during the month of February only 300 tons were actually delivered; but it is alleged that the transactions during February were in future contracts for various subsequent months, which did not call for deliveries in February, while the February deliveries were made pursuant to contracts made in previous months; and that contracts

maturing in February were always comparatively small in amount. They also admit that the transactions on the Exchange during March, 1923, involved 937,900 tons, while deliveries amounted to only 1,250 tons; but they allege that said contracts were for future deliveries, while the actual deliveries were on contracts made during previous months; and it is denied that such transactions were otherwise illegal. (R. p. 59.)

It thus appears from the pleadings that there is no substantial disagreement as to the character and number of transactions had upon the Exchange, and the functions of the Exchange and the Clearing Association; and that the dispute relates entirely to the effect of such transactions upon the prices and volume of sugar moving in interstate and foreign commerce, and whether or not as a legal deduction the operation of said Exchange and Clearing Association in the manner described is violative of the Anti-Trust Act.

PROCEEDINGS.

Because of the importance of the action the Attorney General filed the certificate provided for in the expediting act of February 11, 1903 (32 Stat. 823; 36 Stat. 854). (R. p. 119.) And notice having been given, application was made to the four circuit judges of the Second Judicial Circuit for a temporary injunction in accordance with the prayer of the petition. Many affidavits and exhibits thereto were filed both in support of and in opposition to the application; and the court after hearing argument denied the

application. It was then agreed by all the parties that the court might finally determine the case upon the record as presented, treating all the affidavits and exhibits as evidence regularly taken and offered. And thereupon the court dismissed plaintiff's petition, from which action an appeal was prosecuted to this court. (R. pp. 172–173.)

ASSIGNMENT OF ERRORS.

Plaintiff assigned the following errors:

1. The court erred in refusing to adjudge and decree that the by-laws, rules, and regulations of the defendant corporations in so far as they relate to sugar, their adoption by said corporations and individual defendants, and the concerted action of defendants in carrying out said rules and regulations, constitute a combination and conspiracy in restraint of interstate and foreign trade and commerce in raw and refined sugar in violation of the Act of July 2, 1890, known as the Sherman Anti-Trust Act, and also in violation of Section 73 of the Act of August 27, 1894, as amended by the Act of February 12, 1913, known as the Wilson Tariff Act.

2. The court erred in not perpetually enjoining the defendants and each of them from the further operation of the Exchange and Clearing Association in so far as sugar is dealt in on said Exchange and Association and from engaging in the operation of any plan or scheme of like character or designed for a like purpose.

3. The court erred in not adjudging and decreeing that the adoption of the by-laws, rules, and regula-

tions of the defendants New York Coffee and Sugar Exchange (Inc.) and New York Coffee and Sugar Clearing Association (Inc.), which are designed to promote transactions in sugar of the character herein described, and the acquiescence in said by-laws, rules, and regulations by the members of said Exchange and Association, and the concerted action of said members under the same whereby transactions unlimited in number are made upon said Exchange and cleared through said Clearing Association purely speculative in character, and in which the seller does not own or expect or intend to acquire sugar for actual delivery or the purchaser does not have any present or future need for sugar, or intend or expect to accept an actual delivery of sugar, constitute a combination in restraint of interstate and foreign commerce in violation of said Anti-Trust Act of July 2, 1890, and of said Section 73 of said Wilson Tariff Act of August 27, 1894, as amended by the Act of February 12, 1913.

4. The court erred in not perpetually enjoining defendants from further permitting transactions upon said Exchange in which the seller does not own or expect or intend to acquire sugar for actual delivery, and transactions in which the purchaser has no present or future need for sugar and does not intend or expect to accept an actual delivery of sugar, and all other transactions of a speculative character.

5. The court erred in not perpetually enjoining defendants from engaging in transactions whereby artificial prices of sugar are created or prices are

affected by artificial means and without regard to the economic law of supply and demand as specifically prayed for in the petition.

6. The court erred in dismissing the petition and not granting the relief prayed for therein. (R. pp. 173–175.)

BRIEF AND ARGUMENT.

I.

Nothing but futures are bought and sold on the Exchange, and there are practically no deliveries made pursuant to such transactions.

As shown above, such fact is substantially admitted in defendants' answer, but because of its importance the following evidence is cited to emphasize the admission. Mr. Diercks, the president of the Exchange, says:

> *Trading in sugar is practically confined on the floor of the Exchange to trading in contracts for future delivery.* Practically no contracts for immediate delivery, known as "spot contracts," take place there, although members of the Exchange make such contracts for immediate delivery *with each other which are not reported to the Exchange.* Any private trading in *futures*, however, by members of the Exchange is forbidden by rules of the Exchange, as the purpose of the Exchange is to maintain an open and untrammeled market in *futures*, where prevailing prices in *futures* are all recorded for the subsequent use and benefit of producers, dealers, and consumers of sugar. (R. p. 68.)

There are sixteen sugar refineries in the United States, which belong to ten companies. This means that all raw sugar sold in the United States must be purchased by only ten consumers of the raw product. Mr. Babst, president of the American Sugar Refining Company; Mr. Post, president of the National Sugar Refining Company; Mr. Lowry, of the firm of R. Atkins & Company, a copartnership; Mr. Jamison, of Arbuckle Brothers, a copartnership; and Mr. Smith, president of the Federal Sugar Refining Company, which concerns operate large refineries of sugar in New York, all testify that said concerns obtain their supply of raw sugar *by purchases from producers made through brokers, and not on the Exchange.* (R. pp. 120, 121, 123, 124, 126.) Mr. Lowry also filed an affidavit for defendants, in which he said that—

> *While we do not purchase our requirements of raw sugar on the Exchange,* we have on two occasions sold a moderate quantity of futures on the Exchange, with the intention of delivering against these sales certain raw sugar that we held. (R. p. 86.)

Mr. W. S. Pardonner, who testifies for the defendants, says the Savannah Sugar Refining Company, of which he is vice president and secretary-treasurer, never buys sugar on the Exchange, but "has frequently protected itself against fluctuations in the value of its sugar by selling contracts for future delivery on said Exchange" (R. p. 118); Mr. J. H. Kempner, president of the Imperial Sugar Company, which operates a refinery at Sugarland, Texas, says his

company has "used the Exchange in a limited way to hedge purchases of raw sugar at Cuba until same could be refined and sold" (R. p. 118); and Mr. Bell, treasurer of the Warner Sugar Refining Company, says that "the warehouses owned by the company are licensed by the Sugar Exchange as warehouses for sugar"; and that "the company has found the New York Coffee and Sugar Exchange a useful medium for making contracts for future deliveries, which enables the company to maintain a constant refiner's margin and protects itself against fluctuations in prices of sugar" (R. p. 117). Therefore, *of the eight concerns engaged in the refining of sugar whose practices are proven none have purchased any sugar through the Exchange* unless it be the Warner Company; and Mr. Bell carefully refrains from stating what kind of contracts it makes upon the Exchange, or how they are settled.

There are also in the record statements of Arthur G. Hoffman, vice president of the Great Atlantic & Pacific Tea Company, a corporation conducting 7,500 chain stores in 2,187 cities located in 30 States of the United States; John A. Badenoch, vice president of Park Tilford, a corporation engaged in the manufacture and sale of candy and in the general grocery business; and Jacques R. Haas, vice president of Loft (Inc.), a corporation engaged in the manufacture and sale of candy, to the effect that none of these concerns buy their supplies of sugar through the Exchange. (R. pp. 128–130.) Each of twenty-six defendants who are members of the Ex-

change files an affidavit in which he says: "All of the contracts in sugar for future delivery made by me or my firm with another member *are cleared through the Clearing Association.*" (R. pp. 84–85.) This means that none of their transactions are settled by actual deliveries.

As to the proportion of actual deliveries to the number of transactions on the Exchange, the answer admits that upwards of 75 per cent of all transactions *are cleared through defendant Clearing Association;* and that the percentages of the contracts cleared through the Association for the months of November and December, 1922, and January, February, and March, 1923, stated in the petition are correct except that the decimal point is incorrectly placed to the left in each of such cases. (R. pp. 48, 49.) It is alleged in the petition that of the total number of contracts cleared through the Association in November, 1922, .0018 per cent were consummated by delivery; that of the total contracts so cleared in December, 1922, .0023 per cent were so consummated; of the contracts in January, 1923, .0010 per cent; in February, 1923, .0002 per cent; and in March, 1923, .0010 per cent were so consummated. (R. p. 14.) Whether the decimal point is correctly placed or not, what is meant is, that the number of deliveries made through the Exchange in November was $\frac{18}{100}$ of 1 per cent; in December, $\frac{23}{100}$ of 1 per cent; in January, $\frac{10}{100}$ of 1 per cent; in February, $\frac{2}{100}$ of 1 per cent; and in March, $\frac{10}{100}$ of 1 per cent of the number of transactions had thereon during such

months, respectively. (Walter Lewis, R. p. 166.) This corresponds with what is said by Lamborn & Company in their booklet, which will be hereafter noticed.

The allegation in the petition that "on an average about 75 per cent of all transactions are cleared through defendant Clearing Association" (R. p. 14) is subject to misconstruction. This statement is based on the table appearing on page 23, which shows the number of contracts made during the months of November and December, 1922, and January, February, and March, 1923, and the number disposed of and the manner of their disposition. It will be observed that 4,011 contracts were carried over from October, and each month a large number remained undisposed of. The relative percentages of the contracts cleared through the Association to those *made* during the months mentioned, as shown by said table, are as follows: For November, 108.8 per cent; for December, 86.7 per cent; for January, 82 per cent; for February, 95.4 per cent; and for March, 96 per cent. To the contracts cleared should be added those matched. And the relative percentages of *deliveries* on the Exchange to the contracts *made* during those months were, for November, $\frac{26}{100}$ of 1 per cent; for December, $\frac{34}{100}$ of 1 per cent; for January, $\frac{15}{100}$ of 1 per cent; for February, $\frac{19}{100}$ of 1 per cent; and for March, $\frac{13}{100}$ of 1 per cent. This is ascertained by calculation from the figures given in the table.

II.

The by-laws and rules controlling the Exchange and Clearing Association are designed to promote speculative transactions and to prevent deliveries of sugar through the Exchange. And when contracts made upon the Exchange are read in the light of its by-laws and rules, it is apparent that an actual delivery is rarely, if ever, contemplated.

The contract for the sale of raw sugar required by the by-laws and rules of the Exchange reads as follows:

OFFICE OF

New York.

Sold for

To

50 tons of 2,240 lbs. each of Sugar in bags, deliverable from licensed warehouse in the port of New York, between the first and last days of ___________________, inclusive. The delivery within such time to be at seller's option upon seven, eight, or nine days' notice to the buyer. The sugar to be of any grade or grades as specified in Section 88a at the price of ______ cents per lb. in bond, net cash for Cuba Centrifugal 96 degrees average polarization outturn with additions or deductions for other grades according to the rates of New York Coffee and Sugar Exchange (Inc.), existing upon the afternoon of the day previous to the date of the notice of delivery.

Either party to have the right to call for margins as the variations of the market for like deliveries may warrant, which margins shall be kept good. This contract is made in view of and in full accordance with the By-

Laws, Rules, and Conditions established by New York Coffee and Sugar Exchange (Inc.).

(Written across the face is the following:) For and in consideration of one dollar to ---------- in hand paid, receipt whereof is hereby acknowledged; ---------- accept this contract with all its stipulations and conditions. (Charter, etc., of Exchange, pp. 48, 49.)

The contracts for duty-free raw sugar and for granulated sugar are similar in form and contain the same provision. (Charter, etc., pages 49, 50, and insert.)

The by-laws, rules, and conditions established by the Exchange corporation are expressly made a part of these contracts, and therefore they can be fully understood only when read in connection with those by-laws, rules, and conditions. Rule 1 of Sugar Trade Rules provides that "By-laws and rules governing transactions in coffee which do not conflict with the Sugar Trade Rules shall apply to sugar in the same manner as to coffee." (Charter, etc., p. 114.) Consequently the rules hereinafter cited apply to sugar, although sugar may not be expressly mentioned in them.

With reference to the quantity of sugar bought or sold, Rule 3 of Sugar Trade Rules provides that "All offers to buy or sell sugar for future delivery, unless otherwise specified, shall be understood to be for fifty tons, and offers to buy or sell in larger quantities shall be in multiples thereof." (Charter, etc., p. 114.)

The first two sentences of Trade Rule No. 12 read as follows:

> All contracts for the future delivery of coffee shall be binding upon members, and of full force and effect until the quantity and quality of the coffee specified in such contract shall have been delivered, and the price specified in said contract shall have been paid. Nor shall any contract be entered into with any stipulation or understanding between the parties at the time of making such contract, that the terms of said contract as specified in Section 88 of the By-Laws are not to be fulfilled, and the coffee delivered and received in accordance with said section. (Charter, etc., pages 82–83.)

If the contract provided for were read solely in the light of this part of Rule 12, it would appear to be a *bona fide* one. But the subsequent conditions and limitations contained in the rule must be carefully considered in order to understand exactly the purposes of the Exchange and how the several contracts made thereon may be manipulated. Immediately following the provisions above quoted, and a part of the same rule, is the following:

> *Provided, however, that any person holding a contract against another, corresponding in all respects, except as to price, and date, with one held by the other party against him, may close or cancel both by giving notice in writing to the opposite party, at any time before notice of delivery; or where a "Ring" may be formed, all*

parties thereto shall be compelled to settle upon the terms hereinafter prescribed.

All "Ring" settlements shall be made at the prices first posted by the Superintendent on the day on which the "Ring" is made, and bills on the "Ring" or direct settlements shall be rendered by 11 a. m. on the day after that on which such "Ring" or settlement shall have been made, and must be paid by 2 p. m. on the day on which they are rendered, under a penalty of one-tenth of 1 cent per pound. On Saturdays all settlements must be made by 11.30 a. m.

The party making a "Ring" shall notify all the parties thereto, and get their initials in acknowledgment, leaving with each a copy thereof. If the "Ring" is not complete he shall, on the same day, notify all the parties thereto. The contract of the earliest date shall, in all cases, be the one considered settled (Charter, etc., page 83).

Rule 15 provides:

> Where a transfer of a contract or a "Ring" has been verbally agreed upon by all parties, and all have been notified, it shall be in force from the time of the acknowledgment, and can not be broken by the failure of any party thereto (Charter, etc., p. 84).

Therefore if a seller or a purchaser has a contract executed by the other party for the same amount of sugar and for delivery in the same month, wherein they occupy opposite positions, he has a right to offset such contract by paying the difference in the price

specified therein. And, say A has sold fifty tons to B for future delivery in August, and B has sold to C, and C has sold to D, and D has sold to E, and E has sold to A, each fifty tons of sugar for delivery in the same month, then on notice as provided for in the rules, a ring may be formed and all of the contracts canceled by paying the differences in the prices stipulated in the contracts.

To facilitate settlements of contracts otherwise than by delivery, *and for no other purpose*, the Clearing Association was organized; and it is expressly provided in the last paragraph of Rule 3 of the Exchange (Charter, etc., pp. 74, 75): "*Unless otherwise stated at the time, all bids and offers and transactions resulting from such bids and offers shall be understood to be for clearance through the New York Coffee and Sugar Clearing Association (Inc.)*"

Section 12 of the By-Laws and Rules of the Clearing Association reads as follows:

> *The Association may accept (and by such acceptance the liability of the Clearing Member whose contract is accepted by the Association towards the other party shall be terminated and the Association substituted therefor) contracts offered to it by Clearing Members for clearance, and by such acceptance shall, in place of either party to a contract so accepted and toward the other party thereto, assume the obligations imposed thereby and succeed to and become vested with all the rights and benefits accruing therefrom, assuming to the buyer the position of seller and to the seller the position of buyer as the case may be.*

Each Clearing Member shall make daily reports to the Association of all contracts for future delivery of coffee or sugar made by such member on the New York Coffee and Sugar Exchange (Inc.), with other Clearing Members in accordance with rules and regulations prescribed by the Directors.

Each report shall be accompanied by a check to the order of the Association, or draft upon it, for the amount necessary, after allowing for amounts theretofore paid on account, to mark outstanding contracts set forth in the report to the last closing bid prices on the New York Coffee and Sugar Exchange (Inc.), for coffee and sugar deliveries in the months mentioned in such contracts, respectively. (Marking a contract to the closing bid prices is the payment or receipt of the difference between the value of the contract at the contract price and at the closing bid price.) There shall also be attached to and be delivered with such report, a check for any original margin that may be required, as prescribed in Sections 14, 15, 16, and 17 of these By-Laws.

All contracts reported to the Association as above provided shall be deemed accepted by it, unless the parties thereto are notified in writing to the contrary by the Association on or before 10.30 a. m. of the following day, up to which time the Association has the right to refuse to accept any contract reported to it as aforesaid. (By-Laws and Rules of Association, pp. 13–14.)

Therefore the Association *becomes the owner* of the several contracts assigned to it, and they become extinguished merely by offsetting or matching, the assignor being paid, or required to pay, the difference according to whether he gained or lost in the day's transaction.

That the brokers who constitute the membership of the Exchange may not in the least be hampered in settling the contracts made by them during the day, *although they make them as agents and are not the real owners thereof*, by Rule 19 (Charter, etc., p. 92) it is provided:

> Any member who may find that he holds, for account of his correspondents, contracts, both of sale and purchase, in the same month, which offset each other, shall be authorized to offset and settle such contracts, and to substitute therefor his own name, and he shall be responsible to his principals for the strict fulfillment of such contracts, and shall be liable to them for all damage or loss they may sustain by reason of such substitution.

But no rule has been adopted which provides a method for measuring or proving the damages that might result to the principal because of the substitution of the broker's name for his, and as a practical matter he is without redress. *Thus each member of the Exchange exercises absolute control over every contract made by him, and can settle them by matching, or by making or entering into rings, without consulting his principal, and even over his principal's protest.*

But suppose a member who sells, or one who purchases, determines to require a delivery of the sugar. It then becomes important to consider the process necessary to compel such delivery. The notice required is thus described in Rule 16:

> When notice of delivery on the part of the seller, or demand of coffee by a buyer (when he has the option so to do) is required by contract, it shall be given by the party furnishing the coffee in the one case, and the buyer in the other case, to the party requiring said notice, either five, six, or seven days prior to the date of delivery, said notice to be given before 10.30 a. m. of the day of issuance (excepting as hereinafter provided). No notice shall be issued on a Saturday.
>
> Notice may be issued by the seller on the last notice day of the month if a sale is made for delivery in the current month, but said notice must be delivered to the buyer within 15 minutes after the sale is made.
>
> No notice shall be issued for over five days, unless either six or seven days shall be necessary to make the delivery fall on a business day. In no case shall a notice be issued that will allow less than three business days for transfer, including the day of its date.
>
> The party receiving the notice may transfer the same to a subsequent party, and it may be given from one transferee to another. Every transfer must be made within twenty minutes, and every person receiving the notice shall indorse upon it the actual time he re-

ceives it. Any party who may fail to forward such notice within that time shall be liable to have the notice returned to him before 4 p. m. of that day. All transfers shall be made within the Exchange hours except as hereinafter provided, the notice becoming a short notice with the close of the Exchange on the day of its issue, and all differences thereon shall be paid as provided in the second paragraph of Rule 12, for payment of ring settlements. When sold as short notice, the payment shall be made direct, and the price made equal to that at which it was first issued.

Transferable Notices issued on the last notice day of the month may be transferred from one transferee to another until one hour after the close of the Exchange, becoming a "short notice" after that hour. (Charter, etc., pages 84–85.)

It is also provided that the issuers of a transferable notice shall have it officially stamped at the Exchange before circulation; and that should the office of a party to whom notice is to be given be closed, it shall be good service to give the notice to the Superintendent of the Exchange. Some modifications of these requirements as applied to sugar appear in Rule 12 of Sugar Trade Rules (Charter, etc., p. 117), and are as follows:

The initial presentation of a transferable notice for the delivery of sugar shall be made before 11 a. m. of the day of issuance. No notice shall be issued on a Saturday.

No notice shall be issued for over seven days, unless eight or nine days shall be necessary to make the delivery fall on a business day.

The party with whom a regular transferable notice shall finally lodge shall, within one hour thereafter, notify the issuer thereof appointing a licensed weighmaster to check the weights and also a sampler and chemist in accordance with Sugar Trade Rule 11, so that the samples may be drawn at the time of weighing. The failure of the receiver to notify the deliverer, as herein prescribed, shall subject him to the additional costs, if any, entailed in sampling after weighing.

And the following is the form provided for a transferable notice and conditions of acceptances:

TRANSFERABLE NOTICE FOR RAW SUGAR.

------ o'clock.

NEW YORK, 192-.

Z, X & Co.:

Take notice that on ---------- shall deliver you 50 tons of 2,240 lbs. each in ---- bags of Centrifugal or Beet Sugar, in accordance with the terms of contract sale to you, dated ---------- at ------ cents per pound.

---- pledge ------ to deliver sampling order to the last holder of this notice upon presentation of the same to ----------; further pledge ------ to deliver on the ---------- between the hours of ------ and ------ to the last acceptor of this notice, the negotiable warehouse receipt and withdrawal entry or entries

for the Sugar, against payment for the said Sugar, at the rate of ______ per pound; allowance, if any, to be made for excess or deficiency in the duty as established between the entry weight and polarization and the delivery weight and polarization.

Z, Y & Co.

CONDITIONS.

In consideration of one dollar paid to each of the acceptors, receipt of which is hereby acknowledged, it is agreed that the last acceptor hereof will, between the hours of ______ and ______ o'clock on the day preceding the ______, present the within notice to Z, Y & Co., and, on the following day, between the hours of ______ and ______ o'clock receive the negotiable warehouse receipt and duly executed withdrawal entry, or entries, and pay for the Sugar at the rate of ______ per lb., basis Cuba Centrifugal 96 degrees average polarization outturn, with additions or deductions for other grades, according to the rate of the New York Coffee and Sugar Exchange, Inc., existing on the afternoon of the day previous to the date of this notice. It is further agreed that each acceptor hereof shall continue his (or their) liability to each other for the fulfillment of the contract until this notice shall have been returned to Z, Y & Co., and a sampling order, specifying the sugar to be delivered, received by the last acceptor hereof from Z, Y & Co., and a negotiable warehouse receipt and withdrawal entry, or entries, shall have been de-

livered, at which time all responsibilities of intermediate parties shall cease.

Z, X & Co.

(Charter, etc., pages 118–119.)

It appears, therefore, that if a buyer has sold to another the same quantity that he had bought and for delivery in the same month, he may transfer his obligation to accept delivery to such purchaser provided he execute the notice within twenty minutes after receiving the same, and the differences between the contracts are settled in the manner provided for ring settlements; and the transfers of the notice may be continued until it probably will find lodgment with a member who can offset it against a sale to the party who is demanding the delivery.

In case a delivery is not made or accepted, notwithstanding notice has been duly given, then the question arises whether Rule 18 (Charter, p. 90) is applicable. This rule reads as follows:

> In case of failure to deliver the coffee named in the contract when due, the basis of settlement of coffee due on such contract for default in delivery shall be one-quarter of one cent per pound on the entire contract above the net cash quotation for No. 7 Spot Coffee of the day of delivery, and in case of failure to receive the coffee named in the contract when due, if it shall prove to be the fault of the buyer, the basis of settlement of coffee to be received on such contract for default in receiving shall be one-quarter of one per cent per pound on the entire contract above the net cash quotation

for No. 7 Spot Coffee of the day following the day of delivery, provided, however, that no seller shall be entitled to receive penalty who has not given the stipulated notice of intention to deliver, and no buyer unless proper demand has been made by him before the expiration of the contract; provided also, that no defaulting party can claim settlement under this rule except upon evidence that the default was unintentional and not premediated.

The price of Spot Coffee shall be fixed by the Spot Quotation Committee, on the actual value of No. 7 Spot Coffee, on said day of delivery, with the right to appeal by any party in interest to the Board of Managers, provided notice of appeal and $25 be deposited with the Superintendent of the Exchange, within twenty-four hours after the Spot Quotation Committee shall have established the net cash price of No. 7, as prescribed in Section 33. Nothing, however, in this rule shall be construed to prevent a settlement by mutual consent.

Rule 18a. Settlement shall be made, if demanded, for any deficiency or excess from weights specified on the face of the contract where the variation is in excess of one per cent and not exceeding four per cent, except where such deficiency is caused by the allowance prescribed in Trade Rule 28, either at the net cash value of No. 7 Spot Coffee on the day of delivery, with one-fourth (¼) of one per cent per pound penalty, or in case of a deficiency the deliverer may supply the quantity required and a supplementary Certificate

> of Grade, to be a part of the original certificate and of the same expiration, to be issued for such additional coffee, provided also that no defaulting party can claim settlement under this rule except upon evidence that the default was unintentional and not premeditated.

The provisions of this rule are made applicable to sugar transactions by sugar trading rule No. 15 (Charter, etc., p. 120), which reads as follows:

> The provisions of Trade Rule 18 shall apply to sugar transactions excepting that the basis of settlement on raw sugar shall be one-quarter of a cent per pound above the quotation for Spot Cuba Centrifugal 96 degrees average polarization outturn, as established daily by the Sugar Committee. On Refined Sugar the settlement shall be made on the Spot Quotation at Chicago as established daily by the Sugar Committee and shall be at the rate of $\frac{3}{8}$ of a cent per pound.
>
> No seller shall be entitled to receive penalty who has not given the stipulated notice of intention to deliver, and no buyer unless proper demand has been made by him before the expiration of the contract; provided, however, that no defaulting party can claim settlement under this rule except upon evidence that the default was unintentional and not premeditated.

How easy it may be made to appear that the default was unintentional depends entirely upon the practice on the Exchange and the inclination of those selected to enforce the rule.

But should all these requirements fail to stop the delivery, then the following provisions, appearing in Rule 21 (Charter, etc., pp. 93, 94), which relate to the actual delivery, become applicable:

The party with whom the transferable notice has finally lodged shall show the same to the issuer thereof, on the day before the delivery and within the prescribed hours, retaining the transferable notice until the delivery is completed.

Should the certificate of grade be ready for representation, the issuer of the notice shall, on the day of delivery, present at the office of the party holding the transferable notice, between the hours of 12 m. and 2 p. m. (except when such business day shall be Saturday, in which case the hours shall be 10.30 a. m. and 11.30 a. m.) a bill, weigher's return, certificate of grade, and negotiable warehouse receipt duly endorsed, for each delivery of about 250 bags of coffee, whereupon the delivery and payment shall be simultaneously made.

Upon a redelivery of a negotiable warehouse receipt, it shall be at the option of the deliverer to deliver the receipt free and clear of all expense or to allow the monthly charge of the warehouse in which the merchandise is stored for each month that has expired since the date of the warehouse receipt, or since the date to which the storage has been paid and so stamped on warehouse receipts, and for fractional part of a month, one-half the monthly charge of such warehouse for the first fifteen

days and the full monthly charge for sixteen days or over.

Should the certificate of grade not be ready for presentation the delivery shall take place as above and the receiver shall make payment of the bill presented retaining ½c. per pound on the net weights delivered until the grading certificate is furnished. Any deliverer of coffee who shall present a bill for more than a grade above that finally established shall be subject to a complaint under Sec. 46 of the By-Laws.

The estimated value of the coffee tendered in this manner must be stated upon the bill and the difference between this amount and that paid shall be, if demanded, deposited in a designated depository of the Exchange in the same manner as required in the deposit of margins, until the certificate of grade is furnished.

On such deposits the parties are entitled to interest at the rate allowed by the depository on the amount ascertained on final settlement to be due to each, but all such deposits are subject to Trade Rule 11 applying to variation margins.

And to make it certain that the real owner of the contract shall have no connection whatever with the delivery of the sugar, Rule 23 (Charter, etc., p. 96) provides:

Coffee delivered on contract shall be so delivered and received only by the brokers employed in such delivery or receipt. *No principal, either by himself or through any agent,*

> *shall be allowed to interfere in such delivery by word or deed, directly or indirectly; and in case of such interference the delivery or receipt of the coffee upon the contract in which such interference shall take place shall be at once stopped, and the principal so interfering shall pay to the other party a penalty of one-half of one cent per pound on all the coffee not delivered thereon at the time such interference took place.*

Then, to penalize anyone who shall insist to the end on delivering or requiring a delivery of sugar, Sec. 104 of the rules provides (Charter, etc., p. 64):

> *Upon the delivery or receipt of coffee, or sugar, or when a contract is settled by a customer giving or receiving a transferable notice in fulfillment thereof, a brokerage, in addition to any commission that the purchase or sale of the coffee, or sugar, may be subject to, shall be paid.*
>
> For delivery or receipt of coffee or sugar such brokerage shall be not less than the corresponding commission prescribed in Section 103 for buying or selling.
>
> When a transferable notice is given or received by a customer in fulfillment of a contract, the brokerage in that case shall be not less than one-half of the corresponding buying or selling commission prescribed in Section 103.

The commissions on sugar transactions appear in Sec. 103 (Charter, etc., pp. 62, 63), and are as follows:

RAW SUGAR (PER CONTRACT OF 50 TONS).

For members residing within the United States, Cuba, and Porto Rico:

Based upon a price—	Commission for buying or selling.	Floor brokerage for buying or selling.
Below 4 cents	$6.25	$1.50
4 cents up to 9.99 cents	7.50	1.75
10 cents up to 12.99 cents	8.75	1.85
13 cents up to 17.99 cents	10.00	2.00
18 cents and above	12.50	2.50

For nonmembers residing within the United States, Cuba, and Porto Rico double the above rates of commission shall be charged.

For members and nonmembers residing outside the United States, Cuba, and Porto Rico a commission of $2.50 shall be charged in addition to the above rates.

REFINED SUGAR (PER CONTRACT OF 800 BAGS).

The minimum rate of commission for members residing within the United States, Cuba, and Porto Rico:

Based upon a price—	Commission for buying or selling	Floor brokerage for buying or selling.
Up to 9.99c	$7.50	$1.75
10c up to 12.99c	8.75	1.85
13c up to 17.99c	10.00	2.00
18c up	12.50	2.50

For nonmembers residing within the United States, Cuba, and Porto Rico double the above rates shall be charged.

For members and nonmembers residing outside the United States, Cuba, and Porto Rico a commission of $2.50 shall be charged in addition to the above rates.

Whenever before thirty minutes after the close of the Exchange a member gives to another member for clearance purchases and sales of contracts corresponding in all respects except as to price, made during the day by himself or for his account when present on the floor of the Exchange, a charge for each contract shall be made equal to the corresponding floor brokerage rate for buying and selling, in addition to any floor brokerage incurred.

Members procuring business for other members may, by agreement, be entitled to one-half the commission rates for nonmembers prescribed in this section, less the corresponding brokerage charge, whether paid or not. But the division of nonmembers' rates of commission for procuring business, as prescribed in this section, must be based only on the scheduled rates prescribed therein, without regard to the additional charge imposed in said section.

The above-mentioned rates shall be, in each case, the minimum commission that may be charged by any member of the Exchange, and shall be absolutely net and free of all and any rebate and discount, in any way, shape, or manner; nor shall any bonus or pro rata percentage of commission be given or allowed to any clerk or individual, not a member of the Exchange, for business procured or sought

for any member of the Exchange; and any arrangement having in view, directly or indirectly, any rebate from the said rates shall be deemed an evasion and violation of this By-Law.

To prevent any interference by the courts at the instance of a member with the affairs of the Exchange, Section 84 of the By-Laws and Rules (Exchange, etc., p. 42) provides:

> "*Any member who shall himself, or whose partner or partners shall apply for an injunction or legal instrument restraining any officer or committee of the Exchange from performing his or its duties under the By-Laws and Rules shall, by that act, cease to be a member of the Exchange.*"

The total extra cost incident to a delivery of sugar on the Exchange will appear from quotations from a booklet recently issued by Lamborn & Company, who are brokers and members of the Exchange and the Clearing Association, Lamborn himself being a member of the board of directors of the Exchange. This booklet is entitled "Modern Methods of Marketing Cuban Raw Sugar"; and it describes in considerable detail the uses of the Exchange and operations thereon. *And it appears therefrom that the intention to make the Exchange only a rendezvous for speculators in sugar futures, and not a conduit through which sugar shall actually pass from the producer or manufacturer to their customers, is fully accomplished.*

In this booklet under the head "Should the Price of Near-by Futures be the Same as the Cost and Freight Price" (Booklet, pages 10 to 15), it is said:

> It is expensive to deliver or receive sugars through the channels of the Exchange. The idea, therefore, is that the seller will buy back his Exchange contract and sell in the cost and freight market, and that the buyer will sell his Exchange contract and buy in the cost and freight market.

On the same subject it is again said:

> Question. Does it cost more to deliver through the channels of the Exchange than to deliver in the ordinary way?
>
> Answer. Yes.
>
> Question. Why?
>
> Answer. To be safe. Without going into details, the Exchange provides certain guarantees to effectually safeguard the delivery and receipt of sugar. It provides certain machinery of delivery which is somewhat cumbersome in order that it be safe. This is true of all commodity Exchanges.
>
> Question. How much does it cost to deliver on the Exchange?
>
> Answer. *At the present writing, it costs the seller a minimum price of about 11c. and a maximum price of about 16c. to place sugars in warehouse and deliver on the New York Exchange. It also costs buyers about 14 cents to accept delivery on the New York Exchange and redeliver to their own warehouses, or to refiners.*
>
> Question. Is it possible to buy and sell futures on the Exchange without paying this extra expense?

> Answer. *Yes. Approximately 6,000,000 tons of sugar were traded in during 1922 on the New York Coffee and Sugar Exchange, but only 55,000 tons were actually delivered through the channels of the Exchange.* Under the rules of the Exchange, the seller of futures may buy back his Exchange contract, thereby being in a position to sell his actual sugars in the open market. The buyer also may sell his futures contract and buy his actual sugar in the open market.
>
> *By so doing, they save the unnecessary expense of deliveries and receipts through Exchange channels. It is very simple. The two Exchange contracts cancel each other automatically through machinery provided by the Exchange.*

Then, under the heading "How it Works—An Example," it is said:

> Let us assume that the original Exchange transaction was made at \$5.00. Let us further assume that as the time for liquidation arrives the cost and freight market is still at \$5.00. If delivery is made on the Exchange, the seller must pay, let us say, 16c., so that he will net only \$4.84. The buyer if he accepts delivery must also pay 14c. for delivery charges, so that his cost would be \$5.14.
>
> Normally, the seller would be glad to buy on the Exchange at \$5.00 and sell in the cost and freight market at this price, thereby saving the cost of making delivery. Normally, the buyer would be glad to sell at \$5.00 and buy in the cost and freight market at this price, thereby

saving cost of taking delivery. But it sometimes happens that it would be very embarrassing to the buyer to accept delivery. The seller is in a much better position to make delivery, and if he knows he has the advantage, which he sometimes does, he can sometimes buy back his contract at a lower price than the cost and freight price. Regardless of the fact that it costs the seller, say, 16c to make delivery, it costs the buyer 14c to accept delivery. If the seller gives notice of delivery, the buyer must sell within twenty minutes or accept delivery. If he accepts, it will cost him 14c. Any amount less than 14c below the cost and freight market (where he will buy if he sells futures) will be a saving. Possibly, the buyer might not wish to tie up money at that particular time and would let the seller have the contract at $4.86, or the full 14c under the cost and freight market. A speculator might get panicky and accept even less. In the above case the seller would sell his actual sugar for $5.00 to which would be added this 14c profit. The seller would have made 14c more than expected and the buyer 14c less. The reverse also may be true. The buyer might be in a better position to accept delivery than the seller was in to make delivery. The advantage would then be with the buyer. Regardless of the fact that it costs the buyer 14c to accept delivery, it costs the seller 16c to make delivery. If the buyer thinks the seller can not make delivery, due to delayed arrival of raws, or for any other reason, the buyer will not sell his

> futures and buy cost and freight at par. The buyer will try to get a higher price for his futures than the cost and freight market. The seller might locate a lot of cost and freight raws that he could deliver, but this would cost 16c. Any amount less than 16c above the cost and freight market (where he would sell if he buys futures) would be a saving. The seller might not wish to buy a round amount of cost and freight sugars to deliver against a small amount of futures and, therefore, might pay $5.16, or the full 16c premium over the cost and freight market. A speculative seller might get nervous and pay even more. (Booklet, pp. 12–15.)

Under the caption "Extremes Above or Below Cost and Freight Should Not Govern Your Futures Transactions" (Booklet, pp. 15–18), the author of this booklet further says:

> We have shown that with the cost and freight market at $5.00 futures might sell at or slightly lower than $4.86 or as high as $5.16—possibly a little higher. The price will always be a reflection of the composite views of the interested buyers and sellers. While the obvious would be for buyers and sellers to liquidate futures at the exact price of the cost and freight market, thereby giving advantage to neither buyer nor seller, this can not be made compulsory and still have a free market. Human nature will have its fling. The buyer will try to outtrade the seller in making him think that he will accept de-

livery and the seller will try to outtrade the buyer and try to make him think he will make delivery. Buyers and sellers in the Sugar Exchange market are no different from buyers and sellers the world over. The buyer is always trying to buy low and the seller to sell high. These are natural instincts. *They can not be stifled. The safety valve is that every time the seller makes the buyer take delivery or the buyer makes the seller make delivery, they are both penalized by the respective costs of making and taking delivery.*

No one delivers or receives on the Exchange because they want to pay these extra expenses. It is a question of delivering small quantities through the Exchange in order to try to outguess the other fellow. For example, say a seller has sold 5,000 tons on the Exchange. The month for delivery arrives. If he can not repurchase at about the cost and freight market, he may issue delivery notice for, say, 500 tons. He will risk spending 11c. to 16c. per 100 pounds extra on 500 tons to improve his chances of buying back the other 4,500 tons at or below the cost and freight market. It may work. On the other hand, if the buyer thinks he can outguess the seller, he will accept delivery of the 500 tons. The buyer will risk spending 14c. per 100 pounds extra on 500 tons, with the object of discouraging the seller and making him pay above the cost and freight market for the other 4,500 tons.

From the above it would seem conclusive that the extremes above and below the cost

and freight market should not govern your course of action.

It seems very certain that no such large volume as nearly 6,000,000 tons of sugar could have been traded in during 1922, if every time the seller sold at, say, $5.00, and the buyer bought at, say, $5.00, they figured that with the cost of making and taking delivery they were selling at $4.84 and buying at $5.14. If every Exchange sale was made on the premise by the seller that he would net 16c. less than the Exchange price, and on the premise by the buyer that it would cost him 14c. more than the Exchange price, there would be a difference of 30c. between the net to the buyer and the net to the seller at the same Exchange price. This difference, if figured by every seller and every buyer, would have seriously reduced the volume of business. That buyers and sellers have thought correctly in not figuring the full cost of making and taking delivery, is shown by the fact that *less than 1 per cent of the volume of trading resulted in deliveries through the Exchange channels.*

A person making a limited number of transactions might consider deducting from the selling price the cost of making delivery, or adding to his buying price the expense of taking delivery. The fewer the number of transactions, the safer this would make it. The more constantly the Exchange is used, the safer it would be to figure that while the cost and freight market will not always be the same as the *near-by* Exchange deliveries—

> sometimes being a little higher and sometimes a little lower—on the average it will work out about the same as the Exchange market.

It is apparent, therefore, that the Exchange was intentionally so organized and controlled as to prohibit the making of deliveries pursuant to contracts made thereon; and that it was established solely for the purpose of trading or speculating in futures, with no expectation or intention that the contracts entered into on the Exchange should be consummated by a bona fide compliance with their terms.

III.

Relation between the prices of near-by futures on the Exchange and prices in the cost and freight market.

As there is no trading in spot sugar on the Exchange, the spot prices are controlled by the prices of the near-by futures.

That the Exchange prices govern or vitally affect the spot prices of sugar in the cost and freight market is really undisputed; but the court's attention is specially called to the following evidence upon the subject.

In an interview which Maj. L'Esperance, a special assistant to the Attorney General, had with Mr. Stroud, superintendent of the Exchange, Mr. Stroud said: "*The transactions on this Exchange every day fix the price of sugar for the entire world; the refiners do not make a move until this Exchange opens in the morning.*" (R. p. 169.)

Mr. Post, of the National Sugar Refining Company of New Jersey, states: "That the prices which said corporation [the National Sugar Refining Company] has been compelled to pay for raw sugar required in the conduct of its business are strongly influenced, and at times seemingly controlled, by the prices established as a result of transactions in 'futures' taking place from day to day on the floor of the New York Coffee and Sugar Exchange (Inc.); that the rapidly advancing price of raw sugar since February 1, 1923, has necessitated correspondingly rapid increases in the price of refined sugar." (R. p. 126.)

The same statement in effect is made by Mr. Babst, of the American Sugar Refining Company (R. p. 123); Mr. Jamison, of Arbuckle Brothers (R. p. 122); Mr. Lowry, of R. Atkins & Company (R. p. 125); and Mr. Smith, of the Federal Sugar Refining Company (R. p. 120).

Bearing upon this subject, in Lamborn & Company's booklet, it is said:

> If this is done [the seller buy back his contract and sell in the cost and freight market] when the Exchange prices and the cost and freight prices are identical, then both buyer and seller of the original futures contracts have changed their futures contracts (on which there is the cost of making and taking delivery) to raw sugar cost and freight, at the total price of their original futures contracts.
>
> Theoretically it should be possible to buy or sell futures for nearby delivery at approxi-

mately the same price that you would pay or obtain in the open market for the actual commodity. That is, if you had sold futures and when the delivery date approached if you wished to buy back the contract you had sold, you should be able to do this at about the price then ruling in the raw market cost and freight New York.

But this is where theory and fact part company. As you will see by the accompanying charts there is usually a slight difference between the cost and freight market and the nearby futures market, although the two markets keep returning to equality. There is no such thing as an average variation. The variation, however, is rarely more than slight. The variation would probably be even less if none but refiners and raw sugar producers used the Exchange, but speculators can not be kept out of the market. To be of value, it must be free. (Booklet, pp. 10, 11.)

And again:

Those who use the Exchange more or less constantly can, we believe, with considerable safety consider that the cost and freight market—sometimes being a little higher; sometimes a little lower—will on the average work out *about* the same as the Exchange market. To one making a very limited number of transactions it would probably be safest to allow a margin or difference between the Exchange price and the cost and freight market. The amount of this margin or difference might be determined by the cost of

> making delivery on the Exchange if a seller, or accepting delivery if a buyer. (Booklet, p. 11.)

On pages 14 and 16 of the booklet are two charts which show the close relationship between the cost and freight market prices and the prices on the Exchange. In connection with a table showing spot prices of raw sugar on the several dates from February 1 to April 21, 1923, Mr. Diercks says:

> I give below the *spot* prices in New York on each of said days, from which it will be seen that the price for spot sugar rose concurrently with the advances in futures and with the refiners' advances for refined sugar. No spot sugar is sold on the Exchange, *but the Exchange keeps a record of prices as determined each day by its Sugar Committee, for purposes of settlement in accordance with Sugar Trade Rule 50, hereinbefore set forth.* (R. 76.)

And a comparison of the tables (R. pp. 20, 76) does show, as said by Mr. Diercks, that spot prices and prices of futures fluctuated in the same way, though not always to the same extent. This table will be again referred to hereafter.

The foregoing evidence shows that the prices of sugar in the market both for immediate and future delivery are controlled entirely by the prices upon the Exchange, although there may be a slight difference between the spot price and the price of the nearest future.

IV.

Contracts on the Exchange.

1. Hedging Contracts.

The foregoing facts and deductions therefrom will be helpful in discussing intelligently the different classes of transactions upon the Exchange. Consideration will first be given to hedging contracts.

With reference to such contracts it is said in the answer:

> That a large part of the total volume of trading in sugar for future delivery in the exchange room of said Exchange, as above described, consists of contracts made by producers of sugar, refiners, merchants, and other consumers, *who make such contracts entirely for the purpose of insuring themselves against price fluctuations, respecting sugar either owned, sold, or purchased by them, for the purpose of merchandising or shipping to consuming markets or refining, or using in manufactured products in which sugar is used, and that in most cases such contracts for future delivery are fulfilled by the making of counter contracts to offset the ones originally made; the actual sugar which such future contracts were based upon being sold or disposed of to refiners or others.* (R. pp. 40, 41.)

Mr. Diercks, president of the Exchange corporation, says:

> Although it is impossible actually to state the proportion, since it is within no single man's knowledge or means of knowledge, I am

> convinced that the greater part of the trading in sugar on the floor of the Exchange represents transactions legitimately made by producers, dealers, or consumers of sugar for the purpose of protecting themselves from fluctuations in value of the sugar which they own or have bought or intend to buy. The quantity of sugar dealt in on the Exchange necessarily is many times larger than the amount of sugar actually involved in commercial operations, for the reason that three or more owners or handlers of such sugar may seek the benefits of future trading to protect them in their legitimate business. (R. p. 68.)

Mr. Bennett, first vice president of the Bank of America, says:

> We are always willing to loan to a greater extent against sugar purchased or owned by the borrower if any loss due to a decrease in the value of the sugar is protected by sales of "futures" on the Sugar Exchange, because such sales afford protection against possible loss arising from marked fluctuations in price. We, therefore, regard the opportunities which the Sugar Exchange gives for the making of future contracts as a valuable economic function and of great importance in connection with the normal trade in sugar. Such contracts for future delivery, in our opinion, have the effect of stabilizing the market, tending to prevent sudden fluctuations. (R. p. 89.)

Similar statements are made on behalf of defendants by Bernard D. Forster, vice president of the Bank of Manhattan Company (R. p. 89); Walter F.

Frew, president of the Corn Exchange Bank (R. p. 90); Joseph W. Harriman, president of the Harriman National Bank (R. p. 91); William N. Kingsley, vice president of the United States Trust Company (R. p. 91); H. J. Cook, vice president of the Equitable Trust Company (R. p. 92); F. J. Leary, vice president of the Central Union Trust Company (R. p. 115); and E. W. Stetson, vice president of the Guarantee Trust Company (R. p. 115). Defendants also introduced statements by Charles Godchaux, president of the Godchaux Sugars (Inc.) (R. pp. 93, 94), and Horatio B. Young, secretary of the W. J. McCahan Sugar Refining and Molasses Company (R. pp. 94, 95), to the effect that they sometimes purchase future requirements on the Exchange and frequently protect themselves by selling contracts for future delivery on the Exchange; and also introduced the statement of Charles C. Dupratt, of the American Beet Sugar Company (R. p. 93), to the effect that their concern had not yet protected itself against fluctuations in the price of sugar by selling contracts on the Exchange, but had been considering doing so; and that in his judgment the Exchange "fulfills a great economic function and facilitates the marketing of the sugar crop by keeping the producing and consuming public advised of the trend of world opinion with respect to prices." Mr. Strauss, chairman of the board of directors of the Cuba Cane Sugar Corporation, "one of the largest single producers of raw sugar in the island of Cuba," says "We find opportunities afforded by the New York

Coffee and Sugar Exchange for making contracts for the sale of futures advantageous and useful in our business by permitting us to limit our risks on the fluctuations of the market" (R. p. 116). Twenty-six members of the Exchange say that to their personal knowledge the greater part of the transactions on the Exchange in which they and their firms have participated "constituted hedges made by parties who were actually engaged in the producing, handling, or distribution of sugar for the protection of actual sugar transactions" (R. pp. 84, 85). Manifestly, therefore, defendants realize that the justification, if there be any, for the existence of the Sugar Exchange is in the fact that the Exchange affords to *bona fide* sellers or purchasers of sugar an opportunity to secure themselves against loss, which it is claimed is done by means of hedging contracts.

In the first place, defendants are undoubtedly mistaken as to the ratio between hedging contracts and those that are purely speculative. There is some permanency about a hedging contract. It is not canceled on the day it is made but is carried probably for two or more months. The table on page 23 of the record shows the number of contracts made during each month from November, 1922, to March, 1923, inclusive, and also the number carried over from each preceding month. There were generally about twice the number made as were carried over, and in February, 1923, there were about seven times, and in March about four times as many made as had been carried over. All this clearly shows that

purely speculative contracts are always in excess of those made for hedging purposes, and for the latter months mentioned they were greatly in excess.

But as so much stress is laid upon hedging contracts, let us study them carefully and ascertain their functions and effect.

In all illustrations it will be assumed that the cost and freight price and the Exchange price are the same, as is assumed in the examples given by Lamborn & Company, and also by Meinrath Brokerage Company, to which reference will be hereafter made.

The several classes of hedging contracts will be considered separately.

1st. Selling Sugar.

(a) *Selling futures on the Exchange in anticipation of actual sales to be made outside the Exchange.*

In such a transaction, of course, the seller never intends to make an actual delivery but to cancel the sale by a subsequent contract of purchase on the Exchange of a like quantity.

Suppose it is January, and a cane grower or grinder expects to have 100 tons of sugar for delivery in May; the price for May deliveries is $5.00 per hundred pounds, and he is willing to accept that price for his anticipated production. He then sells upon the Exchange 100 tons at $5.00 per hundred. This is called a short sale, because he does not then own the sugar. When May arrives suppose the price has declined to $4.50 per hundred. He then buys

100 tons on the Exchange at \$4.50 and cancels his contract, receiving a margin of 50 cents per hundred profit, and he sells his real sugar outside the Exchange upon the cost and freight market at the prevailing market price of \$4.50 per hundred. This added to his margin of profit makes \$5.00 per hundred, or the price at which the future sale was made in January.

Again, suppose that the price has advanced to \$5.50; then the seller will buy on the Exchange 100 tons at \$5.50 to cancel his contract at \$5.00, and will lose 50 cents per hundred; but he will sell his real sugar on the cost and freight market at \$5.50, or 50 cents more than the price in January; and the 50-cent loss on the Exchange transaction is offset by the 50-cent advance in the market. *In both of these instances the seller receives exactly the price he would have received in January in a bona fide sale of sugar to be delivered in May, but has had to pay the commission on two transactions on the Exchange.*

The above illustration is in substance the same as those given in the booklet by Lamborn & Company. Let us examine those illustrations somewhat minutely. The first one illustrates hedging "to predetermine a colono's profit." (Booklet, pp. 23–25.) A colono is a cane grower in Cuba; and he may want to sell his anticipated crop for delivery at the time it will be converted into sugar. It is there assumed that the colono will have 500 tons of sugar, and that the March price on the Exchange is \$5.00, from which

is deducted 30 cents for the cost of placing the sugar in New York, leaving $4.70, which is called the promedio price. The problem is thus solved for both a declining and an advancing market.

If promedio price declined to		$3.70
You should pay in covering futures about	$4.00	
Price at which you sold futures	5.00	
Add profit on Exchange hedge		1.00
Total price as predetermined		4.70

This is what you set out to effect, i. e., of having your profits based on a promedio price of $4.70.

If the reverse situation exists and sugar has advanced let us say to $6.00, you will take a loss of $1.00 per 100 pounds in covering your futures sale, but the promedio price should also be $1.00 higher, or $5.70. This is the way to figure your receipts in this case.

If promedio price advanced to		$5.70
You should pay in covering futures about	$6.00	
Price at which you sold futures	5.00	
Deduct loss on Exchange hedge		1.00
Total price as predetermined		4.70

In one case the market declined after your hedge and in the other case it advanced, but in both instances you obtained the price you figured on when you hedged.

If at the time your cane was being delivered to the Central, there had been no particular change in the price of futures, you should make no profit or loss on your Exchange transaction. But you would have had the assurance that had the market declined you would still have received a satisfactory figure for your cane (Booklet, p. 25).

It is thus made to appear that the colono is enabled by these transactions on the Exchange to secure in March the price which sugar for March delivery is bringing at the time he desires to make the sale. *But what would the figures be should the colono then sell his* ACTUAL *sugar at the prevailing price for delivery when the sugar shall be produced in March? By such a contract every item in both calculations would be eliminated except the result, to wit, "total price as predetermined, $4.70."*

There is then illustrated with figures a little more complicated "Hedging to determine a central's profit when grinding colono cane." (Booklet, pp. 26–28.) A central is one who grinds the grower's cane. He contracts to give to the grower sugar to the amount of a certain per cent, say from 5 to 7 per cent, of the weight of the cane, or to pay him the promedio price for that quantity of sugar. The rendement is the per cent of the cane that is converted into sugar. In this problem it is supposed that the colono has brought the central 10,000 tons of cane; that the rendement is 10 per cent, of which the colono is to receive 5 per cent, or one-half, and that therefore the central will have 500 tons against which to hedge by selling March futures at $5.00 per hundred pounds. It is also assumed that it will cost the central $2.00 per ton, or $20,000, to grind the cane and 50 cents per hundred pounds, or $5,600, to place the sugar in New York—not in an exchange warehouse, however, because it is not intended that the sugar shall ever be

delivered through the Exchange. The problem is then solved as follows:

Hedges by selling futures at		$5.00
If the Exchange market declines to		4.00
Price of sugar C. & F. N. Y. should decline to about		4.00
Profit on hedge $1.00 per 100 lbs. or total of	$11,200	
Price central would receive for 500 tons of actual sugar at $4.00 C. & F.	44,800	
Gross receipts		56,000
Cost of manufacture	20,000	
Cost of placing C. & F.	5,600	
		25,600
Total profit on all transactions		30,400

Though the market declined as anticipated, the central secured the total profit of $30,400, because of their hedge at $5.00.

Suppose the market advanced, instead of declining, let us say to $6.00. The price of actual sugar C. & F. N. Y. should be about $6.00.

Price central would receive for 500 tons of actual sugar at $6.00 C. & F.		$67,200
Cost of manufacture and placing C. & F.	$25,600	
Loss on hedge	11,200	
		36,800
Total profit on all transactions		30,400

And then it is gravely said:

It will again be noted that the central secured the total profit of $30,400, which they had previously determined was a satisfactory one when they hedged at $5.00.

In each case the result is the same. The central by hedging predetermined the amount of their profit. * * * Whether the market declines, advances, or stays the same, the central by hedging is able to predetermine the approximate amount of their profit.

But why is this done *by hedging?* He could have determined it just as certainly, and without the expense of the Exchange transactions, by making a *bona fide* sale of his sugar for delivery in March. In case he had made such a contract the solution of the problem would be as follows:

500 (long) tons of sugar, at $5.00 per 100 lbs.		$56,000
Cost of manufacture	$20,000	
Cost of placing C. & F.	5,600	
		25,600
Total profit on all transactions		30,400

Another problem of precisely the same character is stated and solved to illustrate "Hedging to determine a central's profit from administration cane." (Booklet, pp. 29, 30.) And by the same simple process it can be shown that hedging contracts on the Exchange for the purpose suggested are absolutely useless.

Many a colono and central has doubtless been made to believe that these two transactions on the Exchange, one the purchasing of futures and the other buying them back at the time specified in the contracts for delivery, which require the payment of commissions to his broker, were absolutely necessary for him to secure with certainty the price sugar was then bringing for delivery at the time specified in the Exchange contract of sale.

Let us again suppose that one who sells his May futures at $5.00, instead of waiting until May to buy back his contract, concludes that he will buy in March when the price has dropped to $4.75. If

it continues to drop until it reaches $4.50 in May, when he is ready to deliver his sugar, he pays on the Exchange 25 cents less than the price at which he sold, and therefore clears a margin of 25 cents; but he loses 50 cents in May on his actual sale of sugar in the cost and freight market, and his net loss therefore is 25 cents.

If, however, when he buys in March the price has increased to $5.25 and it continues to rise until it reaches $5.50 in May, in buying back and canceling his contract on the Exchange he pays 25 cents more than the price at which he sold and loses on the Exchange 25 cents, but he makes 50 cents on his sale of actual sugar in the cost and freight market, and his net gain, therefore, is 25 cents. *But the transaction possesses all the elements of chance incident to a sale or purchase upon the Exchange for the sole purpose of speculation.*

In fact, in hedging it is not the Exchange transaction that stabilizes the deal in actual sugar, but it is the ownership and sale of the sugar that makes certain the result of the Exchange transaction.

(b) *Selling sugar in the cost and freight market and buying futures on the Exchange.*

This is merely suggested in Lamborn & Company's booklet (Booklet, p. 20), and no problem is worked out to illustrate such a transaction. It is there said:

> When futures are selling at a discount you are also presented with an opportunity. Under these circumstances, when the discount

> has become sufficiently attractive, your chance for profit lies in selling your sugar and replacing by buying futures. By doing this you secure cash for your sugar; and if the market rises as anticipated, you approximate the same result as though you had held your sugar.

If such a transaction is called a hedge it is nevertheless nothing other than a straight speculation in futures. If the price goes up the transaction *on the Exchange* will be profitable, because the owner of the sugar buys futures at a lower price than he will pay; but if he should misjudge the market, and it should continue to decline, he would lose, because he pays a greater price than he will receive when he sells; and in either case "*you approximate the same result as though you had held your sugar,*" though the writer is careful to make such suggestion only in connection with a rise in prices.

Of course, if the market should continue on a decline he could sell and avoid further loss, just as is done in connection with any other speculative transaction on the Exchange.

2nd. Buying Sugar.

The Meinrath Brokerage Company manifestly has a large clientage, and is seeking a larger one, of buyers of refined sugar; and they have issued a pamphlet entitled "An outline of the opportunities, advantages, and manner of operating in refined sugar futures on the New York Coffee and Sugar Exchange," a copy of which is filed by defendants with the affidavit of Mr. Charles D. Budd, jr., a

member of the firm. This pamphlet, like that issued by Lamborn & Co., is not printed in but constitutes a part of the record; and a copy is furnished each member of the court. Hedging contracts from the standpoint of the buyers of sugar are described in this pamphlet under the following headings: "Hedging to determine a loss," "Hedging to determine a profit," "Hedging to eliminate a purely speculative profit or loss," and "Hedging to protect against future sales of manufactured products," there being two examples under the last heading, one of a buyer and the other of a seller.

As the first two illustrations deserve the more careful attention, consideration will first be given to the third, fourth, and fifth examples.

(1) The third (Hedging to eliminate a purely speculative profit) is the seller's hedging contract, to insure that he will get the prevailing future price for his sugar, reversed. Green & Co. on May 1 buy in the cost and freight market 2,400 bags of granulated sugar at $8.00 per hundred pounds, to be delivered in July. At the same time they sell *on the Exchange* the same quantity at the same price. If the price advances $1.00 by July they will lose a dollar per hundred on the Exchange contract, because it will cost them that much more to buy their contract back than the price at which they sold, but they can realize on the sugar actually bought $1.00 per hundred profit, which will cancel the loss.

But here it is apparent that if Green & Company are manufacturers of candy or preserves or canned

goods, and want to use their sugar and not sell it, they will lose just a dollar a hundred in the gamble on the Exchange. So if they are wholesale grocers they will doubtless sell their sugar in the trade at a price based on the price which they had contracted to pay, and will suffer the same loss.

Suppose, however, the price declines \$1.00; then G. & Co. will make \$1.00 per hundred on their exchange contract, because they will buy their contract at \$7, but their actual sugar will be worth \$1.00 less than they paid for it. If they have sold their sugar in the trade, or the goods, into the manufacture of which the sugar has entered, on the basis of \$8.00 per hundred pounds for sugar they will clear \$1.00 per hundred; but this profit is derived from the purely speculative contract on the Exchange, just as is the loss if the price advances.

(2) In the fourth example G. & Co. are assumed to be canners of peas, and they want to sell in January and February for future delivery peas in the canning of which sugar will be used that is bought for delivery in May. It is based on the assumption that there is no market outside the Exchange in which sugar can be bought for delivery in May, which is assumed not to be the fact in the other examples given. Anyway, it is not strictly a hedging contract, because G. & Co. are *compelled* to make it, as it is supposed that it is the only way they can purchase sugar. They buy on the Exchange the May futures at \$8.00. If the market advances to \$9.00 they sell their contract at that price, making \$1.00 per hundred pounds, and take

the $9.00 and buy sugar in the cost and freight market at that price, thus obtaining the same quantity of sugar their Exchange contract called for at $8.00.

If the market recedes $1.00 they lose that much in the Exchange transaction, because to cancel their contract they sell at $1.00 less than they paid; but they buy the sugar in the cost and freight market at $7.00, and therefore get the same quantity as that called for in their contract on the Exchange. But the same result would follow if they made a *bona fide* contract for the sugar to be delivered in May; and they would not have to pay a commission on two transactions.

(3) The fifth example is one of pure speculation. There G. & Co. are candy manufacturers; and after they have made a quantity of candy they fear that the price of sugar will decline; and they therefore sell on the Exchange an amount of sugar equivalent to that used in making the candy, for delivery on a near-by future date, at, say, $7.90. If contrary to expectation the market advances G. & Co. must run to cover by buying immediately the same quantity they have sold, suffering, of course, some loss. But if their judgment is correct and the market declines, say, to $7.00, then G. & Co. can buy at that price and cancel their contract at a profit of 90 cents. And it is said: "There would unquestionably have been some declines in the candy market, but Green Bros. would have protected themselves against these declines, at least to the extent they had hedged on the Exchange. Of course, they were not obliged to cover by buying

in at seven dollars, but could have held off longer in anticipation of further decline." And so could any other speculator upon the Exchange.

So a manufacturer of shoes or saddles could "protect" himself on the Sugar Exchange in the same way, and to the same extent, if he expected the price of leather to decline. And whether he would lose or make would depend upon whether the price of sugar would advance or decline.

(4) The first example is "Hedging to determine a loss." There G. & Co. on May 1 purchase *from a refiner* a quantity of granulated sugar for July delivery at $8.00. Later in the month the market declines to $7.50. They fear it will decline further, and hedge by selling the quantity they contracted for at $7.45 on the Exchange for delivery in August. If they are mistaken and the market advances *they must cover at once* by buying the same quantity, or lose to the extent of the advance. If the market declines to, say, $6.50 for July delivery and they can succeed in buying at $6.42 for August delivery, they will make on the Exchange transaction $7.45 minus $6.42, or $1.03; but they will sell their real sugar at a loss of $8.00 minus $6.50, or $1.50. Their net loss, therefore, will be $1.50 minus $1.03, or ·47 cents per hundred. Here is again the assumption that G. & Co. do not want to use the sugar, or have not already sold it, if jobbers, which assumption is generally not true unless they are purely speculators; and if they are speculators they don't want the sugar at all.

(5) The second example is "Hedging to determine a profit." G. & Co. buy from a refiner on May 1 for July delivery at $8.00. The market soon advances to $9.00; and G. & Co. want to make sure that they will realize the dollar profit. They can then make the $1.00 per hundred pounds by selling the sugar actually bought, but they must have it in their business in July. They therefore sell the same quantity on the Exchange at $9.00. The result, whether the market continues to advance or recedes, is thus stated:

> In case of further advances, Green & Co. will buy in on the Exchange, with neither profit nor loss, or perhaps a slight loss. They will take the full benefit of the advance in selling the 2,400 bags which are delivered to them by the refiner at $8.00.
>
> If the market recedes from $9.00, returning to $8.00, Green & Co. will cover by buying three lots (800 bags each) realizing a profit of 100 points or $1.00 per bag. They will still have the 2,400 bags to be delivered by the refiner, which cost $8.00 and are salable on a market of $8.00. It is quite apparent that the profit of 100 points which was determined by the Exchange hedge has actually been established and realized.

This illustration applies only to jobbers, because it is said, "They could, of course, resell the 2,400 bags, but bear in mind that this firm *must have that quantity of sugar for actual distribution to their trade in the month of July.*" If they have sold the sugar in the trade on the basis of $8.00 and the price con-

tinues to advance, they lose on the Exchange transaction, and realize no profit from the advance in the cost and freight market. If the price declines they make a profit on the Exchange transaction, just as any other speculator does. *In fact this is not a hedging transaction for so-called protection, but purely a speculative transaction to realize a profit. And as with every other speculative or gambling contract on the Exchange, G. & Co. make a profit if the price of sugar goes the right way and lose if it goes the wrong way.*

Professor Seligman in his "Principles of Economics," which is quoted from by Mr. Gilmour, witness for defendants (R. p. 109), gives another form of hedging. There an English miller is supposed to purchase in February wheat at Chicago which can not be delivered to him in England until September. The price is then 90 cents per bushel, and fearing that it may decline before delivery he sells on the Exchange the same quantity he has bought. When the wheat arrives in September the price has declined to 75 cents, and by buying the same amount on the Exchange to cancel his contract he makes 15 cents per bushel, which offsets his loss on the wheat actually purchased. Of course if in the meantime the price had advanced he would have lost in the transaction on the Exchange, which would have been offset by the gain in the price of the wheat actually bought. In other words, such a form of hedging insures that the purchaser will get the wheat at the market price at the time of its delivery plus the

broker's commission on the two transactions; and the same result could have been accomplished without paying the commission by stipulating in the contract that the purchaser would pay the market price prevailing when delivery is made.

Considering all the examples given by Lamborn & Company and Meinrath Brokerage Company and Professor Seligman, the obvious thing is that the hedger has made, or contemplates making, the *bona fide* contract in the *real sugar market*, where *sugar* is *actually* bought and sold. He doesn't have if a seller, and doesn't want if a buyer, the sugar at the present time; but will have it or will want it at a future date. He claims he is not a sugar speculator, but wants "protection." And from these examples it appears there are a diversity of desires upon the part of these sellers and purchasers. One buyer wants it to be made certain that he will get the sugar at the then prevailing price for a specified future delivery; another wants a guarantee that he will get it at the market price prevailing at the time of delivery; another wants, if the price starts downward, to be guaranteed that he will not suffer any further loss; and another wants, if the price has gone up, to be guaranteed that he will not lose the then speculative profit by a decline before the date of delivery; and still another, whose sugar has been converted into candy, wants to make in a transaction on the Exchange enough to offset any depreciation in the value of his candy, should the price of sugar decline. The wants of the sellers are about the same,

but are figured out in the reverse way. Those who want it made certain at what price they will sell or purchase sugar on the delivery date can easily obtain what they desire without any use of the Exchange. The one can make a simple contract to take and the other to accept so much sugar at a certain time at the stipulated price. The others who want "protection" are purely speculators. They have in their business the same risks as many other business men, who produce the raw material, or who as manufacturers or jobbers buy supplies needed in the future. The manufacturer of furniture must buy his supply of lumber in advance and sell his goods for future delivery. The manufacturer of shoes must do the same with reference to the leather he needs and the shoes he makes. And the foundryman has to buy his pig iron months in advance, and contract for the future delivery of his product. The furniture maker, the shoe manufacturer, and the foundryman had as well go upon the Sugar Exchange and speculate to save himself against a probable loss, or assure a profit, as the manufacturer of candy or the jobber of sugar. The only difference is that the article dealt in is not in the line of the furniture or shoe manufacturer or foundryman; but the hedging contract of the candy maker is just as distinct from the real contract for sugar as the foundryman's contract on the Exchange would be from his real contract for pig iron.

But the protection is more imaginary than real. As above demonstrated, if the buyer has purchased

sugar for future delivery and the price has declined and he wants to protect himself against further loss by selling, or if he has bought and the price advances and he wants to be sure to realize the profit arising from the advance by then selling, he has to put himself absolutely in the hands of his broker. If when he sells the price starts or continues upward he must buy immediately and sell again when it starts downward. Absolute protection would require a transaction every time the price fluctuated on the Exchange, which, as will be hereafter shown, is practically every day. So at the end of the game the broker's commission would probably about equal the value of the sugar.

Moreover, during periods of excitement on the Exchange it is exceedingly unsafe for a producer of sugar to anticipate its future sale by selling futures on the Exchange. For illustration, take the period from February 1 to February 14 last; and suppose that a colono on February 1 expected to have 500 tons of sugar in September, and sold on the Exchange 500 tons for September delivery to secure the prevailing price of September futures. When the sale was made on February 1, the colono was required to put up a margin of $2,500. Because of the increases in price (see Table R. p. 18) the amounts of margin the colono was compelled to have on deposit from day to day during that period were as follows:

February 2	$3,844
February 3	3,508
February 5	3,000

February 6	$4, 976
February 7	5, 524
February 8	6, 868
February 9	9, 444
February 10	14, 484
February 13	25, 684
February 14	22, 592

The value of the 500 tons of sugar on February 1, 1923, was $43,008, and on February 13, $66,192, which was an advance of $23,184. Therefore, if the additional margin of $11,200 had not been put up when called on the 13th his sale would have been canceled, his deposit of $14,484 appropriated, and he would have been charged with an additional sum of $8,700.

Under such conditions instead of endeavoring to relax the strain upon the *bona fide* traders who have entrusted their interests to the members of the Exchange, every step taken is designed for their own protection regardless of how greatly it may increase the burden upon those whom they represent. Thus while the required margin on February 1 was on the basis of $250 per lot, because of the advance the basis was increased to $400 on February 14, to $500 on February 16, and to $750 on April 20.

2. Contracts Admitted to be Purely Speculative.

With reference to such contracts it is said in the answer:

> That another large part of said future trading in said exchange room consists of contracts made by or for so-called speculators, persons who have capital and make a study of trade conditions affecting prices, and endeavor to

forecast the future prices of sugar and profit thereby, through the making of such contracts for future delivery. (R. p. 41.)

Mr. Diercks also says:

In addition to these actual business transactions in connection with the movement and distribution of the crop, which I believe that even the Government representative will concede to be strictly legitimate and proper, there are transactions in futures on the floor of the Exchange by persons of large capital who study the sources of information with regard to consumption and production and forecast the probable course of prices of the commodity. Such persons make contracts for future delivery on the Exchange with the purpose and intention of taking advantage of the change in price in the event that their forecast of conditions is correct, running the risk of grave loss in the event that their forecast is incorrect. Speculation of this sort is of a most useful character. (R. p. 69.)

And again:

It is true that in addition to these men of capital and intelligence who thus speculate in futures there is some trading in futures by persons without the same degree of capital or intelligence who make future sales or purchases for the excitement and gamble, and that this class of speculation is undesirable and harmful to those who indulge in it, and usually results in a loss to the person so trading, but this class of transactions is in my opinion from my knowledge of transactions

on the Exchange relatively immaterial in volume. (R. p. 70.)

It is not pretended that any member of either of these classes, when he makes a contract of sale or purchase, has any intention to deliver or receive actual sugar. The former trade with the "intention of taking advantage of the change in price" and the latter trade and purchase "for the excitement and gamble." Both classes are concerned only about the margin of profit or loss.

According to the allegations of the answer and the sworn statement of Mr. Diercks, the president of the the Exchange, all transactions on the Exchange belong to the foregoing classes.

It therefore is subject to absolute demonstration that practically all of the contracts, if not every contract, on the Exchange is unlawful and unenforceable under the rules of law laid down by this court, and recognized by all courts as the law governing such transactions.

As heretofore said, defendants justify the existence of the Exchange and Clearing Association because of the opportunity it gives for hedging, or "protection," as they call it. They concede that the other classes of contracts described in their answer, and in the statement of the president, *are made for speculation.* Then let it be supposed that every contract made on the Exchange during a day's session are made for hedging by those who intend to cancel them by subsequent contracts on the Exchange, and who have made, or intend to make, collateral *bona fide* contracts outside the Exchange.

In *Irwin* v. *Williar*, 110 U. S. 499, 508, this court said:

> The generally accepted doctrine in this country is, as stated by Mr. Benjamin, that a contract for the sale of goods to be delivered at a future day is valid, even though the seller has not the goods nor any other means of getting them than to go into the market and buy them; *but such a contract is only valid when the parties really intend and agree that the goods are to be delivered by the seller and the price to be paid by the buyer; and, if under guise of such a contract, the real intent be merely to speculate in the rise or fall of prices, and the goods are not to be delivered, but one party is to pay to the other the difference between the contract price and the market price of the goods at the date fixed for executing the contract, then the whole transaction constitutes nothing more than a wager, and is null and void.*

And in the syllabus the principle decided is thus stated:

> If under guise of a contract to deliver goods at a future day the real intent be to speculate in the rise or fall of prices, and the goods are not to be delivered, but one party is to pay to the other the difference between the contract price and the market price of the goods at the date fixed for executing the contract, the whole transaction is nothing more than a wager, and is null and void.
>
> When a broker is privy to such a wagering contract, and brings the parties together for the very purpose of entering into the illegal

> agreement, he is *particeps criminis*, and can not recover for services rendered or losses incurred by himself in forwarding the transaction.

This expression of the court was quoted with approval in *Clews* v. *Jamieson*, 182 U. S. 461, 489–490, and the court there further said:

> As a sale for future delivery is not on its face void, but is a perfectly legal and valid contract, it must be shown by him who attacks it that it was not intended to deliver the article sold, and that nothing but the difference between the contract and the market price was to be paid by the parties to the contract. And the fact that at the time of making a contract for future delivery the party binding himself to sell has not the goods in his possession and has no means of obtaining them for delivery, otherwise than by purchasing them after the contract is made, does not invalidate the contract. *Hibblewhite* v. *McMorine*, 5 M. & W. 462. Parke, Alderson and Maule, barons, before whom the case was heard, were unanimously of this opinion.
>
> In order to invalidate a contract as a wagering one, both parties must intend that instead of the delivery of the article there shall be a mere payment of the difference between the contract and the market price. *Pearce* v. *Rice*, 142 U. S. 28; *Pickering* v. *Cease*, 79 Illinois, 328. In the latter case it was stated:
>
> "Agreements for the future delivery of grain or any other commodity are not pro-

hibited by the common law, nor by any statute of the State, nor by any policy adopted for the protection of the public. What the law does prohibit, and what is deemed detrimental to the general welfare, is speculating in differences in market values. The alleged contracts for August and September come within this definition. No grain was ever bought and paid for, nor do we think it was ever expected any would be called for, nor that any would have been delivered had demand been made. What were these but 'optional contracts' in the most objectionable sense; that is, the seller had the privilege of delivering or not delivering, and the buyer the privilege of calling or not calling for the grain, just as they chose. On the maturity of the contracts they were to be filled by adjusting the differences in the market values. Being in the nature of gambling transactions, the law will tolerate no such contracts."

And in *Pearce* v. *Rice*, 142 U. S. 28, 40, it was remarked:

"But the evidence before us is overwhelming to the effect that the real object of the arrangement between Hooker & Company and Foote was, not to contract for the actual delivery, in the future, of grain or other commodities—which contracts would not have been illegal (*Pickering* v. *Cease*, 79 Illinois, 328, 330)—but merely to speculate upon the rise and fall in prices, with an explicit understanding from the outset that the property apparently contracted for was not to be delivered, and that the trans-

actions were to be closed only by the payment of the differences between the contract price and the market price at the time fixed for the execution of the contract."

A contract which is on its face one of sale, with a provision for future delivery, being valid, the burden of proving that it is invalid, as being a mere cover for the settlement of "differences," rests with the party making the assertion.

As shown by all the illustrations heretofore given, *in no hedging contract upon the Exchange is an actual delivery of the sugar contemplated, but it is intended that the contract shall be canceled by a corresponding sale or purchase, and that there will be paid or received the margin between the sale and purchase prices. Therefore, during the entire day upon the Exchange everyone who makes a hedging contract to protect a sale, or contemplated sale, and everyone who, on the other hand, makes a contract to protect a purchase, or contemplated purchase, intends precisely the same thing; that is, each one intends to cancel his sale or purchase by a subsequent purchase or sale of the same amount of sugar and the payment of the advance or decline in price. There is absolute agreement upon that subject in the minds of everyone operating on the Exchange.*

In a case which involves a transaction or even a series of transactions between certain brokers on the Exchange, as were the facts in *Clews* v. *Jamieson*, it may be difficult to prove that an actual delivery was not contemplated when such transaction or trans-

actions were had, and the presumption that a delivery was actually intended may not be overcome; *but such presumption is absolutely destroyed when it is conceded that every contract during the day on the Exchange is of such character that no delivery could have been contemplated by either party in the making of any of them.*

Now, if such is the law relating to contracts upon the Exchange when all of them are hedging transactions, a fortiori must the same rule apply when some of the contracts for the day are made by pure speculators, as described in the answer and Mr. Dierck's statement, and all the others are hedging contracts.

The fact that an exceedingly small proportion, considerably less than 1 per cent, of the contracts are consummated by actual deliveries can not prevent the application of the principles of law above stated, because, as explained by Lamborn & Company, they are caused by one speculator driving an opponent into a corner to obtain an advantage over him, when neither of them in fact contemplated making or accepting an actual delivery when the transaction was had.

However, this case does not turn upon the question whether any class of the contracts made upon the Exchange are technically legal, but whether the course of operations upon the Exchange restrains interstate commerce, which will be fully considered hereafter.

V.

The advances in prices of spot and raw sugar from February 1st to the date of the filing of the petition were very largely, if not entirely, the result of speculative operations on the Exchange; and were not justified, or caused by the existing or prospective supply of, or demand for, sugar.

The immediate cause of the filing of the petition on April 9, 1923 was the general and rapid advance in the prices of spot sugar and sugar futures, beginning early in February and becoming particularly marked about February 13th. May futures advanced on the Exchange from $3.65 on February 1st to $5.97 on April 16th, or a total advance within sixty trading days of $2.32 (Pet. R. p. 20); while spot sugar advanced from $3.52 on February 1 to $5.89 on April 16, a total advance of $2.37 (Diercks, R. p. 76). The theory of the petition is that those advances, and the corresponding advances of futures for other months, were not justified by the actual conditions existing in the sugar market, but were at least very substantially the result of pure speculation on the Exchange.

However, the bearing that this increase in the price of sugar and the evidence relating thereto have upon the real question at issue should be kept in mind. Though it were found that a shortage in sugar did exist, which justified an increase in prices, such fact would not be determinative of the case. The question is, Does the Exchange *as organized and operated* unduly enhance or reduce the price of sugar? Do

manipulations and speculations on the Exchange at times substantially retard the effects of natural economic laws, and at other times unduly stimulate and enhance them? In other words, are prices substantially affected by speculations on the Exchange, (1) by increasing or diminishing the results that would naturally flow from actual market conditions, or (2) by the creation in the minds of speculators imaginary conditions which excite them to greater activity, or (3) by the stimulation of trading from causes which have no relation to the supply of and demand for sugar? It is apparent, therefore, that the causes of the fluctuations in the prices of sugar immediately preceding the filing of the petition are not themselves the issue; but the evidence relating thereto has a very material bearing upon the real issue, and as such should be carefully studied.

On February 8 spot sugar was $4.01 and March futures were $4.07; May, $4.07; July, $4.17; and Septemer, $4.23. On the 9th the prices increased as follows: Spot, 20c; March futures, 21c.; May, 25c.; July, 25c.; and September, 23c. On the 10th prices increased, spot, 6c.; March futures, 15c.; May, 29c.; July, 40c.; and September, 45c. The 11th was Sunday, and the 12th was a holiday; and on the 13th the increases over Saturday's prices were, spot, $0.99; March futures, $1.00; May, $1.00; July, $1.00, and September, $1.00; which brought the prices to, spot, $5.26; March futures, $5.43; May, $5.61; July, $5.82; and September, $5.91. (Pet. R. p. 20; Statement of

Diercks, R. p. 76.) The advance in futures on the 13th no doubt would have been greater had there not existed the rule which prohibited a greater increase on the Exchange in one day than 1 cent per pound.

From February 8 to 15 the prices of refined sugar charged by four of the refineries in New York advanced $1.00 by one, $1.25 by two, and $1.30 by one. (Pet. R. p. 21.)

One contention in the answer is that the leap of $1.00 per hundred pounds in the price of all futures, and of 99c. per hundred on spot sugar on the 13th was due to the publication on February 12 of an estimate of the sugar crops made by the Department of Commerce. (R. pp. 54, 55.)

But this contention is not consistent with the claim subsequently made in the answer, "that the recent advance in the prices of sugar is wholly due to the judgment and opinion of those who deal in said commodity and make a study of the conditions surrounding its production and consumption." (R. p. 61.)

According to the rules in the charter one object of the Exchange corporation is "to acquire, preserve, and disseminate useful and valuable business information" in regard to the sugar trade.

Mr. Gilmour, a witness for defendants, in speaking of how prices are reached upon the Exchange, says: "The supply and prospective demand, weather conditions, crops, economic conditions, etc., are all studied and considered, and it is the majority

opinion which prevails, whether rightly or wrongly, which makes the price, frequently far in advance of the events which had been anticipated and discounted." (R. p. 104.) And it is claimed, not only by those giving testimony in this case, but by economists who attempt to justify the existence of exchanges, that those who operate thereon carefully investigate the conditions of both production and consumption, and that the prices reflect a composite judgment reached by them based upon such original investigations.

Every operator on the Exchange had had access to every source of information that was open to the Department of Commerce; and nothing appeared in its report with which the members of the Exchange were not familiar. *Then, if the Exchange performs such a useful function in forecasting the future and fixing prices for future delivery, why should the statement issued by the Department of Commerce have produced such agitation in trading on the Exchange?*

But what was the information contained in this estimate of the Department of Commerce, which the answer alleges was "an adequate cause for the abrupt and sudden rise in prices on February 13, 1923"? Those parts of that estimate which are quoted in the answer as constituting the adequate cause are as follows:

> In 1921–1922 the world's sugar consumption was 500,000 tons greater than production, and the prospects are that it will be 700,000 tons greater in 1922–1923. If these prospects

materialize, the heavy accumulated stocks of the end of the 1921–1922 season will have given way by the end of 1922–1923 to a carry over below the pre-war normal figure.

* * * * *

This year starts with another 4,000,000-ton Cuban crop in sight, a big crop in Java, and a greatly increased production in Europe. But various decreases elsewhere, notably in the United States, have brought the world production only 125,000 tons higher than it was last year, to supply consumption needs estimated at 350,000 tons more than in 1922, and 725,000 tons larger than production.

* * * * *

That the estimated production for 1922–1923 was 18,308,000 tons, and the estimated consumption 19,035,000 tons. (R. pp. 54, 55.)

To an intelligent reader who knows something about sugar—the very subject with which every operator on the Exchange is specially familiar—the facts stated meant that the Department of Commerce estimated that there would be 125,000 more tons of sugar produced this year than there were last year, but that there would be 350,000 tons more consumed; that the consumption would exceed the production by 725,000 tons; and that therefore the carry-over would be less than it usually was during the pre-war period. And a glance at the report would have shown that the estimated carry-over was 476,000 tons.

The same information was contained in the headlines and comment of the Journal of Commerce, in its issue of February 10, from which the following is quoted in the statement of Mr. Diercks:

> WORLD SHORTAGE OF SUGAR IS FORECAST—DEFICIENCY FOR 1923 PLACED AT 250,000 TONS—DEPARTMENT OF COMMERCE SAYS CONSUMPTION NEEDS ARE 725,000 TONS ABOVE PRODUCTION, WITH 476,000 TONS CARRY-OVER.

The newspaper article opened with this sentence:

> Washington, Feb. 9th. A World sugar shortage this year of more than 250,000 tons was officially predicted to-day by the Department of Commerce. (R. pp. 74, 75.)

That is, it was estimated that there would be 476,000 tons of sugar more than the world would need. And because there would not be a million tons the world could not consume instead of 476,000 tons, the world woke up on Wednesday, February 14, to find that consumers had to pay a cent a pound more for sugar than was being paid the day before. In other words, there was extorted from the people of the United States about $2,000,000 per week, not because there was any prediction of an actual shortage in sugar, or that there would come a day within the period of time about which anyone would undertake to prophesy, when one would want sugar and there would not be an abundance to meet his every want, but because the margin of excess would be only 476,000 tons.

Previous experience, especially the experience of b[illegible] years before, taught that the expectation of

an excess of consumption over production would stimulate production for the ensuing year, and would quickly depress consumption; and it was well known that sugar taken from the factories for the year 1921 and 1922 had increased 2,482,000 tons over that taken during the previous year and was 1,180,000 tons in excess of consumption before the war, which clearly indicated that a large stock was being held in reserve by the middlemen and consumers. And therefore not only was the estimated increase of 350,000 tons in consumption not justified, but the probabilities were that it would fall below what it had been the previous year.

Moreover, there was no new information contained in the statement issued by the Department of Commerce. There was not a fact stated therein that had not for some time been known to every man operating on the Exchange or connected with the sugar industry. Mr. Gilmour, an expert witness for defendants, in his argument attempting to justify the advance in the prices of sugar, quotes the following from the issue of the "International Sugar Journal" *for December, 1922:*

PRODUCTION AND CONSUMPTION.

> Last month we published Willett & Gray's preliminary estimates of the 1922–23 world's sugar crops. They revealed, as that eminent firm of statisticians themselves remarked, that there is very little change indicated for any of the important sugar crops of the world, particularly those of cane sugar, which total

practically the same as those of 1921–22. In the Continental United States the output of beet and cane is expected to be some 335,000 long tons less than last year; on the other hand, Europe is expected, bar accidents, to increase the beet sugar output by 644,000 long tons.

The net result of all the sugar crops is estimated by Willett & Gray as at most an increase of some 362,000 tons. Unfortunately, the world is faced by the fact that as compared with last December, the carry-over into 1923 is to be less by the huge amount of one million to one and a half million tons. *Give therefore a maintenance only of the 1922 demand for consumption, a shortage will develop during 1923 which is bound to send the price of sugar up still higher*. There are, it is true, those who argue that the 1922 consumption is not a true one, but is the result of the restocking of invisible supplies which had diminished during the abnormal post-war years, and that therefore 1923 will show a decreased consumption. But there is apparently little or no evidence to support this view, while the contrary is indicated by the fact that the trade distributing channels generally are too well stocked. More probable is it that the Old World is getting out of the restrictive groove in which the war landed it and is seeking a bigger per capita consumption, while the New World, so far as the United States is concerned, has developed a permanently increased demand for sugared drinks to take the place of the prohibited alcoholic beverages.

> *The result is that in 1923 sugar consumption will have overtaken and passed production.* The producer will hence be in receipt of a much more remunerative price for his sugar, which will *inter alia* give him the means to enlarge his output, either by laying down more efficient machinery or else by increasing his cane crops and milling a large output of cane. (R. p. 96.)

Therefore, as far back as December, 1922, the trade generally was thoroughly familiar with the expectation that consumption of sugar would very substantially exceed production.

Another significant fact is thus incidentally stated by Mr. Gilmour:

> To state that these "future" operations were simply a matter of paper speculation is entirely to try to cloud the question, for the largest sellers at all times were those who represented actual producers, or those who had bought actual sugar for arrival in the United States at a future date and sold "futures" on the Exchange as a hedge. (R. p. 97.)

This conclusively shows that both the producers and the purchasers of sugar and their representatives were all the time satisfied with the prevailing prices, and knew of no reason justifying an advance, or they would not have been hedging to secure the existing price.

Therefore the establishment of the claim that the report of the Department of Commerce was the cause of the advances in sugar prices would be a

condemnation of the Sugar Exchange. If the report imparted information with which the members of the Exchange were not familiar, the claim that the Exchange performs a useful function in securing advance reliable information with reference to the conditions of sugar crops is conclusively refuted. There was nothing in the report which was not known to or could not have been easily ascertained by any member of the Exchange. If it was the *form* and not the *substance* of the report that caused the orgy of trading and the consequent advances in prices, the Exchange certainly has no proper place in the economic life of the country. It may be that the report was "an *adequate* cause for the abrupt and sudden rise in prices," considering the organization of and the operations on the Exchange and its influence upon prices, but it certainly was not a *sufficient* cause to have produced the least disturbance in the market *in the absence of a piece of machinery of the nature of the Exchange.* Moreover, if the headlines and introduction of the report were seized upon by the owners of large quantities of raw sugar or by speculators as an excuse for and a means of producing a panic on the Exchange resulting in the abrupt and sudden rise in prices, the existence of an instrumentality that can be, and is, so manipulated is a menace to the public welfare and violative of the Anti-Trust Act, and it should be suppressed.

Estimates of the Cuban crop made some time subsequent to the sudden and abnormal advance in

February are cited as a justification of the high price of sugar. For instance, in the petition it is alleged that "the estimates of four recognized authorities of the crop for 1922–1923 are as follows: Guma-Mejer (Cuba), 3,800,000; Willett & Gray (U. S.), 4,000,000; Department of Commerce (U. S.), 4,000,000; H. A. Himely (Cuba), 4,102,857. (R. pp. 18, 19.) In the answer it is admitted—

> that the estimates of four of the recognized authorities, to wit, Guma-Mejer, Willett & Gray, Department of Commerce, and H. A. Himely, on the crop for 1922–1923 were, as of the date when they were made, as stated in complainant's bill, but they allege that since the date of said estimates two of said recognized authorities have revised and reduced their estimates, and that Guma-Mejer on April 25th, 1923, further reduced his estimate from 3,800,000 tons to 3,670,000 tons, and that H. A. Himely, on April 20, 1923, reduced his estimate from 4,102,857 tons to 3,735,000, or approximately a quarter of a million tons. (R. p. 53.)

However, *these revised estimates could have had nothing whatever to do with the agitation on the Exchange and sudden skyrocketing of prices from February 9 to 14.* They are cited, and were probably made to serve, as an excuse for keeping up the prices and as justifying advances up to the filing of the petition.

DAILY FLUCTUATION OF PRICES.

That the general condition of the sugar industry and the existing or prospective relationship between

supply and demand were not responsible for the prices of sugar as published from day to day, but that they were the result of manipulations and speculations on the Exchange, is conclusively shown by a study of the daily change in prices. The petition contains a table showing the "Closing prices on New York Coffee and Sugar Exchange for each trading day from February 1, 1923, to April 16, 1923." (R. p. 20.) With reference to this table it is said in the answer:

> * * * these defendants admit that the table therein contained showing the closing prices on the New York Coffee and Sugar Exchange for each trading day from February 1, 1923, to April 16, 1923, is substantially correct, and they allege that said trading for the most part was subsequent to the said publication by the United States Department of Commerce. (R. p. 55.)

This table is here reproduced, adding just before the price each day for each delivery month the amount of advance or decline from the previous day's price. The plus sign indicates an advance from the previous day and the minus sign a decline.

Closing prices on New York Coffee and Sugar Exchange for each trading day from February 1, 1923, to April 16, 1923.

	March delivery.	May delivery.	July delivery.	September delivery.
Feb. 1	$3.56	$3.65	$3.76	$3.84
2	+$0.13 3.69	+$0.12 3.77	+$0.12 3.88	+$0.12 3.96
3	− .02 3.67	− .02 3.75	− .02 3.86	− .03 3.93
5	− .05 3.62	− .04 3.71	− .04 3.82	− .04 3.89
6	+ .24 3.86	+ .16 3.87	+ .17 3.99	+ .18 4.07
7	+ .10 3.96	+ .08 3.95	+ .06 4.05	+ .04 4.11
8	+ .11 4.07	+ .12 4.07	+ .12 4.17	+ .12 4.23

Closing prices on New York Coffee and Sugar Exchange for each trading day from February 1, 1923, to April 16, 1923—Continued.

	March delivery.		May delivery.		July delivery.		September delivery.	
Feb. 9	+$0.21	$4.28	+$0.25	$4.32	+$0.25	$4.42	+$0.23	$4.46
10	+ .15	4.43	+ .29	4.61	+ .40	4.82	+ .45	4.91
13	+ 1.00	5.43	+ 1.00	5.61	+ 1.00	5.82	+ 1.00	5.91
14	− .18	5.25	− .21	5.40	− .42	5.40	− .41	5.50
15	− .36	4.89	− .38	5.02	− .22	5.18	− .22	5.28
16	+ .18	5.07	+ .20	5.22	+ .17	5.35	+ .21	5.49
17	+ .21	5.28	+ .23	5.45	+ .23	5.58	+ .23	5.72
19	− .15	5.13	− .14	5.31	− .14	5.44	− .15	5.57
20	+ .07	5.20	+ .06	5.37	+ .06	5.50	+ .07	5.64
21	+ .26	5.46	+ .28	5.65	+ .27	5.77	+ .23	5.87
23	+ .08	5.54	+ .08	5.73	+ .06	5.83	+ .07	5.94
24	− .22	5.32	− .22	5.51	− .24	5.59	− .24	5.70
26	− .22	5.10	− .28	5.23	− .27	5.32	− .29	5.41
27	− .02	5.08	− .04	5.19	− .07	5.25	− .07	5.34
28	+ .40	5.48	+ .34	5.53	+ .37	5.62	+ .37	5.71
Mar. 1			+ .12	5.65	+ .12	5.74	+ .11	5.82
2			− .07	5.58	− .09	5.65	− .08	5.74
3			− .17	5.41	− .17	5.48	− .17	5.57
5			+ .06	5.47	+ .07	5.55	+ .05	5.62
6			+ .10	5.57	+ .11	5.66	+ .14	5.76
7			+ .01	5.58	− .02	5.64	− .03	5.73
8			+ .17	5.75	+ .20	5.84	+ .22	5.95
9			− .09	5.66	− .08	5.76	− .08	5.87
10			+ .03	5.69	+ .04	5.80	+ .03	5.90
12			+ .17	5.86	+ .19	5.99	+ .19	6.09
13			− .10	5.76	− .10	5.89	− .09	6.00
14			+ .02	5.78	+ .03	5.92	+ .03	6.03
15			+ .01	5.79	− .01	5.91	+ .01	6.04
16			− .05	5.74	− .04	5.87	− .04	6.00
17			+ .02	5.76	+ .05	5.92	+ .05	6.05
19			− .03	5.73	− .02	5.90	− .01	6.04
20			− .14	5.59	− .13	5.77	− .12	5.92
21			− .09	5.50	− .08	5.69	− .08	5.84
22			+ .18	5.68	+ .19	5.88	+ .20	6.04
23			− .13	5.55	− .13	5.75	− .14	5.90
24			− .11	5.44	− .09	5.66	− .10	5.80
26			+ .08	5.52	+ .07	5.73	+ .07	5.87
27			+ .14	5.66	+ .15	5.88	+ .18	6.05
28			− .03	5.63	− .05	5.83	− .06	5.99
29			− .01	5.62	− .01	5.82	− .02	5.97
Apr. 2			− .05	5.57	− .05	5.77	− .05	5.92
3			+ .01	5.58	+ .01	5.78	+ .01	5.93
4			+ .04	5.62	+ .04	5.82	+ .04	5.97
5			+ .13	5.75	+ .14	5.96	+ .14	6.11
6			+ .01	5.76	+ .01	5.97	+ .02	6.13
7			.00	5.76	.00	5.97	− .02	6.11
9			+ .12	5.88	+ .14	6.11	+ .17	6.28
10			+ .03	5.91	+ .03	6.14	+ .01	6.29
11			+ .01	5.92	+ .01	6.15	+ .01	6.30
12			− .06	5.86	− .09	6.06	− .10	6.20
13			.00	5.86	.00	6.06	+ .01	6.21
14			+ .01	5.87	.00	6.06	.00	6.21
16			+ .10	5.97	+ .11	6.17	+ .10	6.31

Mr. Dierck's statement contains a table showing the prices of spot sugar each day from February 1 to April 21. That table is here reproduced, and there is added or subtracted the amount that would equalize the price with the price the same day for the nearest futures up to April 16, the last date given in the table appearing in the petition. For illustration, on February 1 the price for spot sugar was \$3.52, which plus 4 cents equals \$3.56, the price of March futures; on February 3 the price for spot was \$3.77, which minus 10 cents equals \$3.67, the price of March futures. After February the nearest futures were for May.

1923.			1923.		
February	1	\$3.52+4	March	7	\$5.40+18
"	2	3.64+5	"	8	5.56+9
"	3	3.77−10	"	9	5.58+8
"	5	3.71−9	"	10	5.52+17
"	6	3.77+9	"	12	5.64+22
"	7	3.89+7	"	13	5.64+12
"	8	4.01+6	"	14	5.64+13
"	9	4.21+7	"	15	5.64+15
"	10	4.27+16	"	16	5.64+10
"	13	5.26+17	"	17	5.64+12
"	14	5.02+23	"	19	5.52+21
"	15	4.77+12	"	20	5.64−5
"	16	5.02+5	"	21	5.44+6
"	17	5.07+21	"	22	5.52+16
"	19	5.27−4	"	23	5.52+3
"	20	5.14+6	"	24	5.52−8
"	21	5.27+15	"	26	5.38+14
"	23	5.52+2	"	27	5.52+14
"	24	5.52−20	"	28	5.52+11
"	26	5.38−28	"	29	5.52+10
"	27	5.52−44	April	1	....
"	28	5.52−4	"	2	5.58−1
March	1	5.64+1	"	3	5.52+6
"	2	5.44+4	"	4	5.52+10
"	3	5.52−11	"	5	5.64+11
"	5	5.26+21	"	6	5.64+12
"	6	5.38+19	"	7	5.72+4

1923.		1923.	
April 9	$5.76+12	April 16	$5.89+8
" 10	5.89+2	" 17	6.02
" 11	5.89+3	" 18	6.27
" 12	5.89−3	" 19	6.28
" 13	5.89−3	" 20	6.14
" 14	5.58+29	" 21	6.27

(R. p. 76.)

There are two striking features shown by these tables:

First, the daily variation of the prices; and, second, that there was not a uniform advance, but at times a marked decline. The line of prices is as variable as the tracing of a seismograph recording the tremors of an earthquake.

The pressure from supply and demand is constant, or swings slowly from one side to the other. The supply of an article does not become exhausted or materially depleted within a day or a week unless it is limited in quantity and confined to one locality and is subjected to the ravages of fire, flood, or other destructive agency. And it is wholly abnormal for a demand for an article to be greatly increased overnight. *Certainly there was nothing unusual happening to the sugar crops, or the supply of sugar on hand between February 1 and February 14, or more particularly between February 10 and 13. Nor, so far as the record discloses, had there been one pound added to the rate of consumption or to the demand for sugar. Between February 10th and 13th, who had tried to purchase a pound of sugar and could not get it? Who had ordered spot sugar, or made an order for March, May, July, or September delivery and had been met*

State; and the officers of these corporations, who are sued both as individuals and in their representative capacity, and all the other members thereof, who were made parties defendant, not by name, but through said corporations and their officers. The petition alleges a violation of both the first or conspiracy section of the Sherman Anti-Trust Act, and those provisions of the Wilson Act of February 12, 1913, which prohibit combinations in restraint of trade when an importer is a party thereto. And the object of the petition is to prevent defendants from further engaging in and carrying out a combination and conspiracy in restraint of interstate and foreign trade and commerce in raw and refined sugar. The petition states the sources from which the United States draws its supplies of sugar, and the quantities derived from each of these several sources for the years 1920, 1921, and 1922, and describes the operations on the Exchange. (R. pp. 12–17.) It is alleged that the volume of transactions relating to refined sugar are inconsequential as compared to the dealings relating to raw sugar; that such raw sugar as is actually delivered in consequence of transactions on the Exchange is stored in bonded warehouses licensed by the Exchange corporation; that actual transactions on the Exchange in an overwhelming majority of instances do not involve, and are not intended to involve, the delivery of the amount of raw sugar purported to be sold thereby; that such transactions are completed by matching, ring settlements, or payments of differences, and by

clearing through the Clearing Association where settlements are reached by matching, payments of differences, etc.; that on an average about 75 per cent of all transactions are settled through the Clearing Association; that of the total number of contracts cleared through the Association in November, 1922, $\frac{18}{100}$ of 1 per cent were consummated by delivery; of the total number of contracts cleared in December, 1922, $\frac{23}{100}$ of 1 per cent were so consummated; of the contracts of January, 1922, $\frac{10}{100}$ of 1 per cent, and of February, 1923, $\frac{2}{100}$ of 1 per cent, and of March, 1923, $\frac{10}{100}$ of 1 per cent were so consummated; that by reason of the large number of firms and corporations with which its members are connected, or which transact their business in accordance with the rules of the Exchange, it has become the largest commercial center for transactions relating to sugar in the world; that while but little sugar is actually delivered in settlement of the numerous transactions on the Exchange, yet such transactions are regarded as binding obligations and as establishing the price of sugar for the day for the date of delivery; and the fluctuations of prices are carefully tabulated and immediately transmitted by wire to all the markets of the world, and are published in the press of the United States and of many foreign countries, and the prices thus established and published are taken by those who own and sell sugar and those who purchase sugar as the basis for prices in actual transactions; and thus by their speculations and gambling in sugar futures defendants control the prices which the

refiner pays for raw sugar, and also the prices which dealers and consumers pay for refined sugar; that the prices thus fixed are established upon a wholly speculative and artificial basis, without proper regard to the conditions which, but for said unlawful and uneconomic operations, would control said prices; and that said Exchange and Clearing Association serve no legitimate or useful purpose in the marketing in interstate and foreign commerce of raw and refined sugar, but serve only as a means of contracting and speculating with reference to supplies of sugar that in many instances do not exist, which is done for the purpose of manipulating the prices of raw and refined sugar without regard to conditions actually obtaining in the industry, and regardless of the law of supply and demand, and solely for illegitimate gambling or speculative profits. (R. pp. 12–16.)

There is then given statistics taken from recognized authorities showing the supply and estimated supply of sugar for 1920–21, 1921–22, and 1922–23, and the relative production of sugar in Cuba for 1921–22 and the estimated production for 1922–23, and the stocks on hand in the several ports of the United States on April 7–11, 1922 and 1923; and it is alleged that there is no economic justification for a sudden or appreciable increase in the prices of raw or refined sugar. (R. pp. 14–19.) A table is then given showing the prices of raw sugar for March, May, July, and September deliveries, 1923; from February 1 to April 16, 1923; and also a table showing quotations of refined sugar by five refineries

situated in New York on February 1, 8, 15, March 15, 27, 29, and April 5 and 12, 1923; and it is then alleged that the rapid increases there shown in the prices of sugar were the direct result of a combination and conspiracy between the two corporations mentioned and the officers and members of those corporations and their clients or principals, who, by means of reported purchases and sales of sugar, sought to and did establish artificial and unwarranted prices not governed by the law of supply and demand, but based wholly on speculative dealings, not involving the delivery of the quantities of sugar represented thereby, but carried on for the purpose and with the effect of unduly enhancing the prices of sugar. (R. pp. 19–21.) It is further alleged that since February 7, 1923, there has been an orgy of speculation in raw sugar through the instrumentality of the Exchange and the Clearing Association; that enormous quantities of raw sugar, greatly in excess of the quantities customarily dealt in and more than the total stocks of raw sugar then in existence, have been the subject of fictitious or paper sales; that the transactions on the Exchange during February, 1923, though a short month with two holidays, aggregated 1,515,050 tons, as compared with 362,850 tons in January, while during February only 300 tons were actually delivered as the result of transactions on the Exchange; and that during March, 1923, transactions purporting to involve the purchase and sale of raw sugar were had on the Exchange to the extent of 937,900 tons, while de-

liveries amounted to only 1,250 tons. (R. p. 22.) Also a table is given showing for the months of November and December, 1922, and January, February, and March, 1923, the number of contracts made, open contracts from the previous month, contracts cleared through the Clearing Association, those upon which actual deliveries were made, and the contracts matched; and it is alleged that as the result of these fictitious or paper transactions the prices of raw sugar and also of refined sugar have been increased on an average of considerably more than $2.00 per hundredweight; and that the speculative operations described, and which were carried on with a common understanding and for the purpose and with the intent of unduly enhancing the prices of both raw and refined sugar, and which had accomplished that object, constitute and are an unlawful combination and conspiracy in restraint of interstate and foreign trade and commerce in raw and refined sugar, and have resulted, and will continue to result unless restrained by the court, in the continued enhancement of the prices of raw and refined sugar, and also in a diminished demand therefor, thereby lessening the traffic therein in interstate and foreign commerce. (R. pp. 23–25.) And it is prayed that it be adjudged and decreed that the by-laws, rules, and regulations of the defendant corporations, in so far as they relate to sugar, their adoption by said corporations and individual defendants, and the concerted action of said defendants in carrying out said rules and regulations,

constitute a combination and conspiracy in restraint of interstate and foreign trade and commerce in raw and refined sugar in violation of the Act of Congress of July 2, 1890, known as the Sherman Anti-Trust Law, and also of Section 73 of the Act of August 27, 1894, as amended by the Act of February 12, 1913, known as the Wilson Tariff Act, contrary to public policy and detrimental to the people of the United States and in derogation of their common right; and that defendants be perpetually enjoined from maintaining and operating, and from engaging in the operation of, the Exchange and Clearing Association in so far as they deal or purport to deal in sugar; from establishing, maintaining, operating, or engaging in the operation of any plan or scheme of like character, or designed, or intended to establish artificial prices of sugar, or to substantially affect the prices of sugar by artificial means, or the necessary result of which would be to so establish and affect the prices of sugar; that the defendants be enjoined from publishing or making public any price or prices of raw or refined sugar as being or purporting to be the market price of sugar as established by or observed in the transactions on the Exchange; and from attempting to establish the prices named in the transactions on said Exchange as the market prices of sugar to be observed in bona fide transactions actually involving the purchase, sale, and delivery of sugar; and that they be also enjoined from entering into or permitting to be entered into any transactions on the Exchange or elsewhere involving or

purporting to involve the purchase, sale, and delivery of sugar, unless the person purporting to make such sale has in his possession or under his control a supply of sugar adequate to meet the requirements of such transaction, and the person purchasing or purporting to purchase shall in good faith intend to buy and pay for such sugar and accept delivery thereof as soon as same can be made. (R. pp. 25–28.)

ANSWER.

The answer admits the organization of both corporations, but corrects some errors made in the petition with reference to the parties who are officers of and control said corporations. (R. pp. 34–35.) With reference to operations upon the Exchange and through the Clearing Association the answer contains the following important statements and admissions:

It designates two classes of transactions engaged in by the members *which are not made upon the Exchange.* Both of these classes consist of actual sales of sugar. It then describes the third class of transactions, which *are made* upon the Exchange. It says that many of the members, either in person or as brokers or agents, make with other members of the Exchange purchases and sales of coffee and sugar for future delivery, said contracts providing that the seller shall deliver in New York the coffee or sugar covered by the contract upon any date of the named month that he shall select; "*that the entire trading in said exchange room consists of making or*

transferring contracts for future delivery"; that all orders received by members to buy or sell must be executed in the open market under the Exchange rules and only during the hours for regular trading, and both the buyers and sellers are personally present in the city of New York when the contracts are made; that many of the members of the Exchange are bankers, refiners, producers, users, and manufacturers of sugar, etc., who find it to their business advantage to be members of the Exchange, but who are not active on the floor thereof, and many more of the members act only as agents and receive from others on consignment shipments of coffee and sugar to be sold by them as agents, *which they protect by future contracts on the Exchange;* and others of said members act only as agents or brokers in the making of future contracts with other members of the Exchange; and that all contracts for future delivery provide for the delivery of negotiable warehouse receipts which represent the actual commodity and are of only such warehouses as are approved and licensed by the Exchange. (R. pp. 38, 39.)

In describing more particularly the transactions upon the Exchange the answer says that in trading for future delivery in the exchange room during every year many millions of tons of sugar are bought and sold for future delivery, "*and as respects upwards of three-fourths of the sugar covered thereby, said contracts are fulfilled and settled without any delivery of any warehouse receipts, but are settled by off-sets or clearances through the Clearing Association, and*

the payment of differences in market price, or they may be settled by so-called "ring" settlements, which are provided for by the rules of said Exchange and that practically (all) said remaining future contracts are performed or completed during the months specified for delivery, by delivery by sellers to buyers of said warehouse receipts." (R. p. 40.) It is further alleged that a large part of the total volume of trading in sugar for future delivery in the exchange room as above described consists of contracts made by producers of sugar, refiners, merchants, and other consumers, "*who make such contracts entirely for the purpose of insuring themselves against price fluctuations, respecting sugar either owned, sold, or purchased by them, for the purpose of merchandising or shipping to consuming markets or refining, or using in manufactured products in which sugar is used, and that in most cases such contracts for future delivery are fulfilled by the making of counter contracts to offset the ones originally made; the actual sugar which such future contracts were based upon being sold or disposed of to refiners or others. That another large part of said future trading in said exchange room consists of contracts made by or for so-called speculators, persons who have capital and make a study of trade conditions affecting prices, and endeavor to forecast the future prices of sugar and profit thereby, through the making of such contracts for future delivery";* that the Exchange for the information of its members and their customers gather information from all parts of the world in regard to crops and visible supply of sugar

and current prices prevailing in different sugar markets of the world; "*that a very large proportion of all the world's trading in sugar for future delivery takes place in the exchange room of the Exchange,*" but that an exchange is also maintained in New Orleans, and formerly exchanges were maintained at London, Paris, and Hamburg. (R. pp. 40, 41.)

It is also alleged that the rules of the Exchange limit the variation on any day of the price of sugar futures for any month to 1 cent per pound in the price, and the board of managers are given the power to suspend trading whenever such conditions arise that in their judgment the best interests of the Exchange will be thereby promoted, and it is asserted that the purchase and sale of sugar for future delivery upon the Exchange is a distinct benefit to all producers and consumers and those engaged in commerce in sugar and to the public in general "in that it enables carriers of sugar to protect themselves against price fluctuations by the making of 'hedging' contracts upon such Exchange"; and it is further declared that the prices prevailing in future trading at any time are the expression of the preponderance of opinion amongst interested traders as to the future course of the prices of sugar, and that they ordinarily express the normal operation of the natural law of supply and demand; and that the trading in futures in the exchange room and the operations of the Exchange "are substantially similar to those of exchanges dealing in other commodities, such as the Board of Trade of the City of Chicago, dealing in

grain; the New York Cotton Exchange, dealing in cotton; the New York Produce Exchange, dealing in grain and other produce; and that all of said exchanges, as well as this defendant, perform a great and important economic function in connection with the distribution of the products in which they deal." (R. pp. 42, 43.)

With reference to the functions of the Clearing Association, it is alleged that it "does not make any purchases or sales of coffee or sugar, and that it does not deal in coffee or sugar except as an agency in clearing contracts of members of the said Exchange and of the said Clearing Association, *and that its clearance of said contracts is simply an offsetting of contracts of certain members against the contracts of certain other members, and guarantees of performance, and that in such respect it constitutes a mere convenience, avoiding undue waste of time and effort, and affords a protection by its requirements of suitable margin to protect contracts*"; and that the only exception is that it has the power under its charter to buy or sell coffee or sugar in the market for the purpose of protecting itself against a default by a member; but that in the entire existence of the Clearing Association very few such purchases or sales have ever been made. (R. pp. 43, 44.)

In answering specifically the charges in the petition relating to the transactions on the Exchange it is said, "*They admit that transactions on the Exchange in a great majority of cases do not involve the delivery of the amount of raw sugar sold thereby*"; but they

deny that such transactions are not intended to involve the delivery of such sugar, or that such sugar is not actually sold thereby, and allege that all transactions on the Exchange contemplate the actual delivery of sugar, and that any buyer can compel its delivery. And "Defendants admit that such transactions are frequently completed on said Exchange by offsets, sometimes called matching, ring settlements, and payment of differences and by clearing through defendant, Clearing Association, where settlements are reached by offsets, sometimes called matching, payments of differences, etc., without delivery of the amount of sugar stated in the contracts," but they allege that all such settlements constitute offsets, and their validity has been established by the decisions of the Supreme Court of the United States and the Court of Appeals of the State of New York. (R. p. 48.) "They admit that on an average of upwards of 75 per cent of all transactions are cleared through defendant, Clearing Association, and that the percentages of the total number of contracts cleared through said Association for the months therein referred to are correctly stated in said paragraph IV of complainant's bill, except that the decimal point is incorrectly placed two places to the left in each of such cases. They admit that the Exchange has become and is the largest commercial center for transactions relating to sugar in the world. They admit that while but little sugar is actually delivered in consequence of the numerous transactions on the Exchange, yet the

purchases at any particular time are regarded as and are binding obligations and as establishing the price of sugar for the day for delivery at such time, and they admit that the course of the dealings, the fluctuations in prices up and down, are carefully tabulated and immediately transmitted by wire to all the markets of the world, and especially to the markets of the United States, and are published in the press of the United States and of many foreign countries"; but they say such transmittal is done by the Western Union Telegraph Company and not by defendants. (R. pp. 48, 49.) "They admit that the prices thus established and published are taken by those who own and sell sugar and those who purchase sugar as the basis for prices in actual transactions in very many cases, but they deny that there is any compulsion or obligation on such persons to take such prices as the basis for actual transactions, and they deny that they or either of them speculate or gamble in sugar for future delivery or control the prices of raw sugar paid by the refiner, or the prices of the wholesaler or jobber, or the prices of the retailer, or the prices paid by consumers throughout the United States." (R. p. 49.)

In answering the section of the petition in which the statistics relating to the condition of the sugar supply are recited the answer goes into considerable detail and undertakes to show that the actual and estimated supply of sugar, as shown by statisticians, are less than those given in the petition, and that the

conditions are more unfavorable than as indicated therein. (R. pp. 51–55.)

It is denied that the price movements for raw sugar were immediately reflected in the prices of refined sugar, but it is admitted "that the price of refined sugar, and also of 'spot' sugar, advanced contemporaneously with the advances in the price of 'futures' on the Exchange, and that the table set forth in the bill of complaint showing the refined sugar quotations of five of the principal refiners of the United States out of the sixteen or more refiners in the United States is substantially correct, and a comparison of the two tables shows that the advances over the same periods of the refiners' prices at times exceeded the advances on the Exchange of future prices"; and it is alleged that since the filing of the bill the prices of both refined sugar as fixed by the refiners and the prices of "futures" as traded in on the Exchange have contemporaneously advanced. (R. p. 56.)

The answer also admits that during February, 1923, the transactions on the Exchange aggregated approximately 1,515,050 tons, as compared with 362,850 tons in January, and that during the month of February only 300 tons were actually delivered; but it is alleged that the transactions during February were in future contracts for various subsequent months, which did not call for deliveries in February, while the February deliveries were made pursuant to contracts made in previous months; and that contracts

maturing in February were always comparatively small in amount. They also admit that the transactions on the Exchange during March, 1923, involved 937,900 tons, while deliveries amounted to only 1,250 tons; but they allege that said contracts were for future deliveries, while the actual deliveries were on contracts made during previous months; and it is denied that such transactions were otherwise illegal. (R. p. 59.)

It thus appears from the pleadings that there is no substantial disagreement as to the character and number of transactions had upon the Exchange, and the functions of the Exchange and the Clearing Association; and that the dispute relates entirely to the effect of such transactions upon the prices and volume of sugar moving in interstate and foreign commerce, and whether or not as a legal deduction the operation of said Exchange and Clearing Association in the manner described is violative of the Anti-Trust Act.

PROCEEDINGS.

Because of the importance of the action the Attorney General filed the certificate provided for in the expediting act of February 11, 1903 (32 Stat. 823; 36 Stat. 854). (R. p. 119.) And notice having been given, application was made to the four circuit judges of the Second Judicial Circuit for a temporary injunction in accordance with the prayer of the petition. Many affidavits and exhibits thereto were filed both in support of and in opposition to the application; and the court after hearing argument denied the

application. It was then agreed by all the parties that the court might finally determine the case upon the record as presented, treating all the affidavits and exhibits as evidence regularly taken and offered. And thereupon the court dismissed plaintiff's petition, from which action an appeal was prosecuted to this court. (R. pp. 172-173.)

ASSIGNMENT OF ERRORS.

Plaintiff assigned the following errors:

1. The court erred in refusing to adjudge and decree that the by-laws, rules, and regulations of the defendant corporations in so far as they relate to sugar, their adoption by said corporations and individual defendants, and the concerted action of defendants in carrying out said rules and regulations, constitute a combination and conspiracy in restraint of interstate and foreign trade and commerce in raw and refined sugar in violation of the Act of July 2, 1890, known as the Sherman Anti-Trust Act, and also in violation of Section 73 of the Act of August 27, 1894, as amended by the Act of February 12, 1913, known as the Wilson Tariff Act.

2. The court erred in not perpetually enjoining the defendants and each of them from the further operation of the Exchange and Clearing Association in so far as sugar is dealt in on said Exchange and Association and from engaging in the operation of any plan or scheme of like character or designed for a like purpose.

3. The court erred in not adjudging and decreeing that the adoption of the by-laws, rules, and regula-

tions of the defendants New York Coffee and Sugar Exchange (Inc.) and New York Coffee and Sugar Clearing Association (Inc.), which are designed to promote transactions in sugar of the character herein described, and the acquiescence in said by-laws, rules, and regulations by the members of said Exchange and Association, and the concerted action of said members under the same whereby transactions unlimited in number are made upon said Exchange and cleared through said Clearing Association purely speculative in character, and in which the seller does not own or expect or intend to acquire sugar for actual delivery or the purchaser does not have any present or future need for sugar, or intend or expect to accept an actual delivery of sugar, constitute a combination in restraint of interstate and foreign commerce in violation of said Anti-Trust Act of July 2, 1890, and of said Section 73 of said Wilson Tariff Act of August 27, 1894, as amended by the Act of February 12, 1913.

4. The court erred in not perpetually enjoining defendants from further permitting transactions upon said Exchange in which the seller does not own or expect or intend to acquire sugar for actual delivery, and transactions in which the purchaser has no present or future need for sugar and does not intend or expect to accept an actual delivery of sugar, and all other transactions of a speculative character.

5. The court erred in not perpetually enjoining defendants from engaging in transactions whereby artificial prices of sugar are created or prices are

affected by artificial means and without regard to the economic law of supply and demand as specifically prayed for in the petition.

6. The court erred in dismissing the petition and not granting the relief prayed for therein. (R. pp. 173–175.)

BRIEF AND ARGUMENT.

I.

Nothing but futures are bought and sold on the Exchange, and there are practically no deliveries made pursuant to such transactions.

As shown above, such fact is substantially admitted in defendants' answer, but because of its importance the following evidence is cited to emphasize the admission. Mr. Diercks, the president of the Exchange, says:

> *Trading in sugar is practically confined on the floor of the Exchange to trading in contracts for future delivery.* Practically no contracts for immediate delivery, known as "spot contracts," take place there, although members of the Exchange make such contracts for immediate delivery *with each other which are not reported to the Exchange.* Any private trading in *futures,* however, by members of the Exchange is forbidden by rules of the Exchange, as the purpose of the Exchange is to maintain an open and untrammeled market in *futures,* where prevailing prices in *futures* are all recorded for the subsequent use and benefit of producers, dealers, and consumers of sugar. (R. p. 68.)

There are sixteen sugar refineries in the United States, which belong to ten companies. This means that all raw sugar sold in the United States must be purchased by only ten consumers of the raw product. Mr. Babst, president of the American Sugar Refining Company; Mr. Post, president of the National Sugar Refining Company; Mr. Lowry, of the firm of R. Atkins & Company, a copartnership; Mr. Jamison, of Arbuckle Brothers, a copartnership; and Mr. Smith, president of the Federal Sugar Refining Company, which concerns operate large refineries of sugar in New York, all testify that said concerns obtain their supply of raw sugar *by purchases from producers made through brokers, and not on the Exchange.* (R. pp. 120, 121, 123, 124, 126.) Mr. Lowry also filed an affidavit for defendants, in which he said that—

> *While we do not purchase our requirements of raw sugar on the Exchange,* we have on two occasions sold a moderate quantity of futures on the Exchange, with the intention of delivering against these sales certain raw sugar that we held. (R. p. 86.)

Mr. W. S. Pardonner, who testifies for the defendants, says the Savannah Sugar Refining Company, of which he is vice president and secretary-treasurer, never buys sugar on the Exchange, but "has frequently protected itself against fluctuations in the value of its sugar by selling contracts for future delivery on said Exchange" (R. p. 118); Mr. J. H. Kempner, president of the Imperial Sugar Company, which operates a refinery at Sugarland, Texas, says his

company has "used the Exchange in a limited way to hedge purchases of raw sugar at Cuba until same could be refined and sold" (R. p. 118); and Mr. Bell, treasurer of the Warner Sugar Refining Company, says that "the warehouses owned by the company are licensed by the Sugar Exchange as warehouses for sugar"; and that "the company has found the New York Coffee and Sugar Exchange a useful medium for making contracts for future deliveries, which enables the company to maintain a constant refiner's margin and protects itself against fluctuations in prices of sugar" (R. p. 117). Therefore, *of the eight concerns engaged in the refining of sugar whose practices are proven none have purchased any sugar through the Exchange* unless it be the Warner Company; and Mr. Bell carefully refrains from stating what kind of contracts it makes upon the Exchange, or how they are settled.

There are also in the record statements of Arthur G. Hoffman, vice president of the Great Atlantic & Pacific Tea Company, a corporation conducting 7,500 chain stores in 2,187 cities located in 30 States of the United States; John A. Badenoch, vice president of Park Tilford, a corporation engaged in the manufacture and sale of candy and in the general grocery business; and Jacques R. Haas, vice president of Loft (Inc.), a corporation engaged in the manufacture and sale of candy, to the effect that none of these concerns buy their supplies of sugar through the Exchange. (R. pp. 128–130.) Each of twenty-six defendants who are members of the Ex-

change files an affidavit in which he says: "All of the contracts in sugar for future delivery made by me or my firm with another member *are cleared through the Clearing Association.*" (R. pp. 84–85.) This means that none of their transactions are settled by actual deliveries.

As to the proportion of actual deliveries to the number of transactions on the Exchange, the answer admits that upwards of 75 per cent of all transactions *are cleared through defendant Clearing Association;* and that the percentages of the contracts cleared through the Association for the months of November and December, 1922, and January, February, and March, 1923, stated in the petition are correct except that the decimal point is incorrectly placed to the left in each of such cases. (R. pp. 48, 49.) It is alleged in the petition that of the total number of contracts cleared through the Association in November, 1922, .0018 per cent were consummated by delivery; that of the total contracts so cleared in December, 1922, .0023 per cent were so consummated; of the contracts in January, 1923, .0010 per cent; in February, 1923, .0002 per cent; and in March, 1923, .0010 per cent were so consummated. (R. p. 14.) Whether the decimal point is correctly placed or not, what is meant is, that the number of deliveries made through the Exchange in November was $\frac{18}{100}$ of 1 per cent; in December, $\frac{23}{100}$ of 1 per cent; in January, $\frac{10}{100}$ of 1 per cent; in February, $\frac{2}{100}$ of 1 per cent; and in March, $\frac{10}{100}$ of 1 per cent of the number of transactions had thereon during such

months, respectively. (Walter Lewis, R. p. 166.) This corresponds with what is said by Lamborn & Company in their booklet, which will be hereafter noticed.

The allegation in the petition that "on an average about 75 per cent of all transactions are cleared through defendant Clearing Association" (R. p. 14) is subject to misconstruction. This statement is based on the table appearing on page 23, which shows the number of contracts made during the months of November and December, 1922, and January, February, and March, 1923, and the number disposed of and the manner of their disposition. It will be observed that 4,011 contracts were carried over from October, and each month a large number remained undisposed of. The relative percentages of the contracts cleared through the Association to those *made* during the months mentioned, as shown by said table, are as follows: For November, 108.8 per cent; for December, 86.7 per cent; for January, 82 per cent; for February, 95.4 per cent; and for March, 96 per cent. To the contracts cleared should be added those matched. And the relative percentages of *deliveries* on the Exchange to the contracts *made* during those months were, for November, $\frac{26}{100}$ of 1 per cent; for December, $\frac{34}{100}$ of 1 per cent; for January, $\frac{15}{100}$ of 1 per cent; for February, $\frac{19}{100}$ of 1 per cent; and for March, $\frac{13}{100}$ of 1 per cent. This is ascertained by calculation from the figures given in the table.

II.

The by-laws and rules controlling the Exchange and Clearing Association are designed to promote speculative transactions and to prevent deliveries of sugar through the Exchange. And when contracts made upon the Exchange are read in the light of its by-laws and rules, it is apparent that an actual delivery is rarely, if ever, contemplated.

The contract for the sale of raw sugar required by the by-laws and rules of the Exchange reads as follows:

OFFICE OF

New York.

Sold for

To

50 tons of 2,240 lbs. each of Sugar in bags, deliverable from licensed warehouse in the port of New York, between the first and last days of ---------------------, inclusive. The delivery within such time to be at seller's option upon seven, eight, or nine days' notice to the buyer. The sugar to be of any grade or grades as specified in Section 88a at the price of ------ cents per lb. in bond, net cash for Cuba Centrifugal 96 degrees average polarization outturn with additions or deductions for other grades according to the rates of New York Coffee and Sugar Exchange (Inc.), existing upon the afternoon of the day previous to the date of the notice of delivery.

Either party to have the right to call for margins as the variations of the market for like deliveries may warrant, which margins shall be kept good. This contract is made in view of and in full accordance with the By-

Laws, Rules, and Conditions established by New York Coffee and Sugar Exchange (Inc.).

(Written across the face is the following:) For and in consideration of one dollar to ---------- in hand paid, receipt whereof is hereby acknowledged; ---------- accept this contract with all its stipulations and conditions. (Charter, etc., of Exchange, pp. 48, 49.)

The contracts for duty-free raw sugar and for granulated sugar are similar in form and contain the same provision. (Charter, etc., pages 49, 50, and insert.)

The by-laws, rules, and conditions established by the Exchange corporation are expressly made a part of these contracts, and therefore they can be fully understood only when read in connection with those by-laws, rules, and conditions. Rule 1 of Sugar Trade Rules provides that "By-laws and rules governing transactions in coffee which do not conflict with the Sugar Trade Rules shall apply to sugar in the same manner as to coffee." (Charter, etc., p. 114.) Consequently the rules hereinafter cited apply to sugar, although sugar may not be expressly mentioned in them.

With reference to the quantity of sugar bought or sold, Rule 3 of Sugar Trade Rules provides that "All offers to buy or sell sugar for future delivery, unless otherwise specified, shall be understood to be for fifty tons, and offers to buy or sell in larger quantities shall be in multiples thereof." (Charter, etc., p. 114.)

The first two sentences of Trade Rule No. 12 read as follows:

> All contracts for the future delivery of coffee shall be binding upon members, and of full force and effect until the quantity and quality of the coffee specified in such contract shall have been delivered, and the price specified in said contract shall have been paid. Nor shall any contract be entered into with any stipulation or understanding between the parties at the time of making such contract, that the terms of said contract as specified in Section 88 of the By-Laws are not to be fulfilled, and the coffee delivered and received in accordance with said section. (Charter, etc., pages 82–83.)

If the contract provided for were read solely in the light of this part of Rule 12, it would appear to be a *bona fide* one. But the subsequent conditions and limitations contained in the rule must be carefully considered in order to understand exactly the purposes of the Exchange and how the several contracts made thereon may be manipulated. Immediately following the provisions above quoted, and a part of the same rule, is the following:

> *Provided, however, that any person holding a contract against another, corresponding in all respects, except as to price, and date, with one held by the other party against him, may close or cancel both by giving notice in writing to the opposite party, at any time before noticc of delivery; or where a "Ring" may be formed, all*

parties thereto shall be compelled to settle upon the terms hereinafter prescribed.

All "Ring" settlements shall be made at the prices first posted by the Superintendent on the day on which the "Ring" is made, and bills on the "Ring" or direct settlements shall be rendered by 11 a. m. on the day after that on which such "Ring" or settlement shall have been made, and must be paid by 2 p. m. on the day on which they are rendered, under a penalty of one-tenth of 1 cent per pound. On Saturdays all settlements must be made by 11.30 a. m.

The party making a "Ring" shall notify all the parties thereto, and get their initials in acknowledgment, leaving with each a copy thereof. If the "Ring" is not complete he shall, on the same day, notify all the parties thereto. The contract of the earliest date shall, in all cases, be the one considered settled (Charter, etc., page 83).

Rule 15 provides:

Where a transfer of a contract or a "Ring" has been verbally agreed upon by all parties, and all have been notified, it shall be in force from the time of the acknowledgment, and can not be broken by the failure of any party thereto (Charter, etc., p. 84).

Therefore if a seller or a purchaser has a contract executed by the other party for the same amount of sugar and for delivery in the same month, wherein they occupy opposite positions, he has a right to offset such contract by paying the difference in the price

specified therein. And, say A has sold fifty tons to B for future delivery in August, and B has sold to C, and C has sold to D, and D has sold to E, and E has sold to A, each fifty tons of sugar for delivery in the same month, then on notice as provided for in the rules, a ring may be formed and all of the contracts canceled by paying the differences in the prices stipulated in the contracts.

To facilitate settlements of contracts otherwise than by delivery, *and for no other purpose*, the Clearing Association was organized; and it is expressly provided in the last paragraph of Rule 3 of the Exchange (Charter, etc., pp. 74, 75): "*Unless otherwise stated at the time, all bids and offers and transactions resulting from such bids and offers shall be understood to be for clearance through the New York Coffee and Sugar Clearing Association (Inc.)*"

Section 12 of the By-Laws and Rules of the Clearing Association reads as follows:

> *The Association may accept (and by such acceptance the liability of the Clearing Member whose contract is accepted by the Association towards the other party shall be terminated and the Association substituted therefor) contracts offered to it by Clearing Members for clearance, and by such acceptance shall, in place of either party to a contract so accepted and toward the other party thereto, assume the obligations imposed thereby and succeed to and become vested with all the rights and benefits accruing therefrom, assuming to the buyer the position of seller and to the seller the position of buyer as the case may be.*

Each Clearing Member shall make daily reports to the Association of all contracts for future delivery of coffee or sugar made by such member on the New York Coffee and Sugar Exchange (Inc.), with other Clearing Members in accordance with rules and regulations prescribed by the Directors.

Each report shall be accompanied by a check to the order of the Association, or draft upon it, for the amount necessary, after allowing for amounts theretofore paid on account, to mark outstanding contracts set forth in the report to the last closing bid prices on the New York Coffee and Sugar Exchange (Inc.), for coffee and sugar deliveries in the months mentioned in such contracts, respectively. (Marking a contract to the closing bid prices is the payment or receipt of the difference between the value of the contract at the contract price and at the closing bid price.) There shall also be attached to and be delivered with such report, a check for any original margin that may be required, as prescribed in Sections 14, 15, 16, and 17 of these By-Laws.

All contracts reported to the Association as above provided shall be deemed accepted by it, unless the parties thereto are notified in writing to the contrary by the Association on or before 10.30 a. m. of the following day, up to which time the Association has the right to refuse to accept any contract reported to it as aforesaid. (By-Laws and Rules of Association, pp. 13–14.)

Therefore the Association *becomes the owner* of the several contracts assigned to it, and they become extinguished merely by offsetting or matching, the assignor being paid, or required to pay, the difference according to whether he gained or lost in the day's transaction.

That the brokers who constitute the membership of the Exchange may not in the least be hampered in settling the contracts made by them during the day, *although they make them as agents and are not the real owners thereof*, by Rule 19 (Charter, etc., p. 92) it is provided:

> Any member who may find that he holds, for account of his correspondents, contracts, both of sale and purchase, in the same month, which offset each other, shall be authorized to offset and settle such contracts, and to substitute therefor his own name, and he shall be responsible to his principals for the strict fulfillment of such contracts, and shall be liable to them for all damage or loss they may sustain by reason of such substitution.

But no rule has been adopted which provides a method for measuring or proving the damages that might result to the principal because of the substitution of the broker's name for his, and as a practical matter he is without redress. *Thus each member of the Exchange exercises absolute control over every contract made by him, and can settle them by matching, or by making or entering into rings, without consulting his principal, and even over his principal's protest.*

But suppose a member who sells, or one who purchases, determines to require a delivery of the sugar. It then becomes important to consider the process necessary to compel such delivery. The notice required is thus described in Rule 16:

> When notice of delivery on the part of the seller, or demand of coffee by a buyer (when he has the option so to do) is required by contract, it shall be given by the party furnishing the coffee in the one case, and the buyer in the other case, to the party requiring said notice, either five, six, or seven days prior to the date of delivery, said notice to be given before 10.30 a. m. of the day of issuance (excepting as hereinafter provided). No notice shall be issued on a Saturday.
>
> Notice may be issued by the seller on the last notice day of the month if a sale is made for delivery in the current month, but said notice must be delivered to the buyer within 15 minutes after the sale is made.
>
> No notice shall be issued for over five days, unless either six or seven days shall be necessary to make the delivery fall on a business day. In no case shall a notice be issued that will allow less than three business days for transfer, including the day of its date.
>
> The party receiving the notice may transfer the same to a subsequent party, and it may be given from one transferee to another. Every transfer must be made within twenty minutes, and every person receiving the notice shall indorse upon it the actual time he re-

> ceives it. Any party who may fail to forward such notice within that time shall be liable to have the notice returned to him before 4 p. m. of that day. All transfers shall be made within the Exchange hours except as hereinafter provided, the notice becoming a short notice with the close of the Exchange on the day of its issue, and all differences thereon shall be paid as provided in the second paragraph of Rule 12, for payment of ring settlements. When sold as short notice, the payment shall be made direct, and the price made equal to that at which it was first issued.
>
> Transferable Notices issued on the last notice day of the month may be transferred from one transferee to another until one hour after the close of the Exchange, becoming a "short notice" after that hour. (Charter, etc., pages 84–85.)

It is also provided that the issuers of a transferable notice shall have it officially stamped at the Exchange before circulation; and that should the office of a party to whom notice is to be given be closed, it shall be good service to give the notice to the Superintendent of the Exchange. Some modifications of these requirements as applied to sugar appear in Rule 12 of Sugar Trade Rules (Charter, etc., p. 117), and are as follows:

> The initial presentation of a transferable notice for the delivery of sugar shall be made before 11 a. m. of the day of issuance. No notice shall be issued on a Saturday.

No notice shall be issued for over seven days, unless eight or nine days shall be necessary to make the delivery fall on a business day.

The party with whom a regular transferable notice shall finally lodge shall, within one hour thereafter, notify the issuer thereof appointing a licensed weighmaster to check the weights and also a sampler and chemist in accordance with Sugar Trade Rule 11, so that the samples may be drawn at the time of weighing. The failure of the receiver to notify the deliverer, as herein prescribed, shall subject him to the additional costs, if any, entailed in sampling after weighing.

And the following is the form provided for a transferable notice and conditions of acceptances:

TRANSFERABLE NOTICE FOR RAW SUGAR.

------ o'clock.

NEW YORK, 192–.

Z, X & Co.:

Take notice that on ---------- shall deliver you 50 tons of 2,240 lbs. each in ---- bags of Centrifugal or Beet Sugar, in accordance with the terms of contract sale to you, dated ---------- at ------ cents per pound.

---- pledge ------ to deliver sampling order to the last holder of this notice upon presentation of the same to ----------; further pledge ------ to deliver on the ---------- between the hours of ------ and ------ to the last acceptor of this notice, the negotiable warehouse receipt and withdrawal entry or entries

for the Sugar, against payment for the said Sugar, at the rate of ------ per pound; allowance, if any, to be made for excess or deficiency in the duty as established between the entry weight and polarization and the delivery weight and polarization.

Z, Y & Co.

CONDITIONS.

In consideration of one dollar paid to each of the acceptors, receipt of which is hereby acknowledged, it is agreed that the last acceptor hereof will, between the hours of ------ and ------ o'clock on the day preceding the ------, present the within notice to Z, Y & Co., and, on the following day, between the hours of ------ and ------ o'clock receive the negotiable warehouse receipt and duly executed withdrawal entry, or entries, and pay for the Sugar at the rate of ------ per lb., basis Cuba Centrifugal 96 degrees average polarization outturn, with additions or deductions for other grades, according to the rate of the New York Coffee and Sugar Exchange, Inc., existing on the afternoon of the day previous to the date of this notice. It is further agreed that each acceptor hereof shall continue his (or their) liability to each other for the fulfillment of the contract until this notice shall have been returned to Z, Y & Co., and a sampling order, specifying the sugar to be delivered, received by the last acceptor hereof from Z, Y & Co., and a negotiable warehouse receipt and withdrawal entry, or entries, shall have been de-

livered, at which time all responsibilities of intermediate parties shall cease.

Z, X & Co.

(Charter, etc., pages 118–119.)

It appears, therefore, that if a buyer has sold to another the same quantity that he had bought and for delivery in the same month, he may transfer his obligation to accept delivery to such purchaser provided he execute the notice within twenty minutes after receiving the same, and the differences between the contracts are settled in the manner provided for ring settlements; and the transfers of the notice may be continued until it probably will find lodgment with a member who can offset it against a sale to the party who is demanding the delivery.

In case a delivery is not made or accepted, notwithstanding notice has been duly given, then the question arises whether Rule 18 (Charter, p. 90) is applicable. This rule reads as follows:

> In case of failure to deliver the coffee named in the contract when due, the basis of settlement of coffee due on such contract for default in delivery shall be one-quarter of one cent per pound on the entire contract above the net cash quotation for No. 7 Spot Coffee of the day of delivery, and in case of failure to receive the coffee named in the contract when due, if it shall prove to be the fault of the buyer, the basis of settlement of coffee to be received on such contract for default in receiving shall be one-quarter of one per cent per pound on the entire contract above the net cash quotation

for No. 7 Spot Coffee of the day following the day of delivery, provided, however, that no seller shall be entitled to receive penalty who has not given the stipulated notice of intention to deliver, and no buyer unless proper demand has been made by him before the expiration of the contract; provided also, that no defaulting party can claim settlement under this rule except upon evidence that the default was unintentional and not premediated.

The price of Spot Coffee shall be fixed by the Spot Quotation Committee, on the actual value of No. 7 Spot Coffee, on said day of delivery, with the right to appeal by any party in interest to the Board of Managers, provided notice of appeal and $25 be deposited with the Superintendent of the Exchange, within twenty-four hours after the Spot Quotation Committee shall have established the net cash price of No. 7, as prescribed in Section 33. Nothing, however, in this rule shall be construed to prevent a settlement by mutual consent.

Rule 18a. Settlement shall be made, if demanded, for any deficiency or excess from weights specified on the face of the contract where the variation is in excess of one per cent and not exceeding four per cent, except where such deficiency is caused by the allowance prescribed in Trade Rule 28, either at the net cash value of No. 7 Spot Coffee on the day of delivery, with one-fourth (¼) of one per cent per pound penalty, or in case of a deficiency the deliverer may supply the quantity required and a supplementary Certificate

> of Grade, to be a part of the original certificate and of the same expiration, to be issued for such additional coffee, provided also that no defaulting party can claim settlement under this rule except upon evidence that the default was unintentional and not premeditated.

The provisions of this rule are made applicable to sugar transactions by sugar trading rule No. 15 (Charter, etc., p. 120), which reads as follows:

> The provisions of Trade Rule 18 shall apply to sugar transactions excepting that the basis of settlement on raw sugar shall be one-quarter of a cent per pound above the quotation for Spot Cuba Centrifugal 96 degrees average polarization outturn, as established daily by the Sugar Committee. On Refined Sugar the settlement shall be made on the Spot Quotation at Chicago as established daily by the Sugar Committee and shall be at the rate of $\frac{3}{8}$ of a cent per pound.
>
> No seller shall be entitled to receive penalty who has not given the stipulated notice of intention to deliver, and no buyer unless proper demand has been made by him before the expiration of the contract; provided, however, that no defaulting party can claim settlement under this rule except upon evidence that the default was unintentional and not premeditated.

How easy it may be made to appear that the default was unintentional depends entirely upon the practice on the Exchange and the inclination of those selected to enforce the rule.

But should all these requirements fail to stop the delivery, then the following provisions, appearing in Rule 21 (Charter, etc., pp. 93, 94), which relate to the actual delivery, become applicable:

> The party with whom the transferable notice has finally lodged shall show the same to the issuer thereof, on the day before the delivery and within the prescribed hours, retaining the transferable notice until the delivery is completed.
>
> Should the certificate of grade be ready for representation, the issuer of the notice shall, on the day of delivery, present at the office of the party holding the transferable notice, between the hours of 12 m. and 2 p. m. (except when such business day shall be Saturday, in which case the hours shall be 10.30 a. m. and 11.30 a. m.) a bill, weigher's return, certificate of grade, and negotiable warehouse receipt duly endorsed, for each delivery of about 250 bags of coffee, whereupon the delivery and payment shall be simultaneously made.
>
> Upon a redelivery of a negotiable warehouse receipt, it shall be at the option of the deliverer to deliver the receipt free and clear of all expense or to allow the monthly charge of the warehouse in which the merchandise is stored for each month that has expired since the date of the warehouse receipt, or since the date to which the storage has been paid and so stamped on warehouse receipts, and for fractional part of a month, one-half the monthly charge of such warehouse for the first fifteen

days and the full monthly charge for sixteen days or over.

Should the certificate of grade not be ready for presentation the delivery shall take place as above and the receiver shall make payment of the bill presented retaining ½c. per pound on the net weights delivered until the grading certificate is furnished. Any deliverer of coffee who shall present a bill for more than a grade above that finally established shall be subject to a complaint under Sec. 46 of the By-Laws.

The estimated value of the coffee tendered in this manner must be stated upon the bill and the difference between this amount and that paid shall be, if demanded, deposited in a designated depository of the Exchange in the same manner as required in the deposit of margins, until the certificate of grade is furnished.

On such deposits the parties are entitled to interest at the rate allowed by the depository on the amount ascertained on final settlement to be due to each, but all such deposits are subject to Trade Rule 11 applying to variation margins.

And to make it certain that the real owner of the contract shall have no connection whatever with the delivery of the sugar, Rule 23 (Charter, etc., p. 96) provides:

> Coffee delivered on contract shall be so delivered and received only by the brokers employed in such delivery or receipt. *No principal, either by himself or through any agent,*

shall be allowed to interfere in such delivery by word or deed, directly or indirectly; and in case of such interference the delivery or receipt of the coffee upon the contract in which such interference shall take place shall be at once stopped, and the principal so interfering shall pay to the other party a penalty of one-half of one cent per pound on all the coffee not delivered thereon at the time such interference took place.

Then, to penalize anyone who shall insist to the end on delivering or requiring a delivery of sugar, Sec. 104 of the rules provides (Charter, etc., p. 64):

> *Upon the delivery or receipt of coffee, or sugar, or when a contract is settled by a customer giving or receiving a transferable notice in fulfillment thereof, a brokerage, in addition to any commission that the purchase or sale of the coffee, or sugar, may be subject to, shall be paid.*
>
> For delivery or receipt of coffee or sugar such brokerage shall be not less than the corresponding commission prescribed in Section 103 for buying or selling.
>
> When a transferable notice is given or received by a customer in fulfillment of a contract, the brokerage in that case shall be not less than one-half of the corresponding buying or selling commission prescribed in Section 103.

The commissions on sugar transactions appear in Sec. 103 (Charter, etc., pp. 62, 63), and are as follows:

RAW SUGAR (PER CONTRACT OF 50 TONS).

For members residing within the United States, Cuba, and Porto Rico:

Based upon a price—	Commission for buying or selling.	Floor brokerage for buying or selling.
Below 4 cents	$6.25	$1.50
4 cents up to 9.99 cents	7.50	1.75
10 cents up to 12.99 cents	8.75	1.85
13 cents up to 17.99 cents	10.00	2.00
18 cents and above	12.50	2.50

For nonmembers residing within the United States, Cuba, and Porto Rico double the above rates of commission shall be charged.

For members and nonmembers residing outside the United States, Cuba, and Porto Rico a commission of $2.50 shall be charged in addition to the above rates.

REFINED SUGAR (PER CONTRACT OF 800 BAGS).

The minimum rate of commission for members residing within the United States, Cuba, and Porto Rico:

Based upon a price—	Commission for buying or selling	Floor brokerage for buying or selling.
Up to 9.99c	$7.50	$1.75
10c up to 12.99c	8.75	1.85
13c up to 17.99c	10.00	2.00
18c up	12.50	2.50

For nonmembers residing within the United States, Cuba, and Porto Rico double the above rates shall be charged.

For members and nonmembers residing outside the United States, Cuba, and Porto Rico a commission of $2.50 shall be charged in addition to the above rates.

Whenever before thirty minutes after the close of the Exchange a member gives to another member for clearance purchases and sales of contracts corresponding in all respects except as to price, made during the day by himself or for his account when present on the floor of the Exchange, a charge for each contract shall be made equal to the corresponding floor brokerage rate for buying and selling, in addition to any floor brokerage incurred.

Members procuring business for other members may, by agreement, be entitled to one-half the commission rates for nonmembers prescribed in this section, less the corresponding brokerage charge, whether paid or not. But the division of nonmembers' rates of commission for procuring business, as prescribed in this section, must be based only on the scheduled rates prescribed therein, without regard to the additional charge imposed in said section.

The above-mentioned rates shall be, in each case, the minimum commission that may be charged by any member of the Exchange, and shall be absolutely net and free of all and any rebate and discount, in any way, shape, or manner; nor shall any bonus or pro rata percentage of commission be given or allowed to any clerk or individual, not a member of the Exchange, for business procured or sought

for any member of the Exchange; and any arrangement having in view, directly or indirectly, any rebate from the said rates shall be deemed an evasion and violation of this By-Law.

To prevent any interference by the courts at the instance of a member with the affairs of the Exchange, Section 84 of the By-Laws and Rules (Exchange, etc., p. 42) provides:

> "*Any member who shall himself, or whose partner or partners shall apply for an injunction or legal instrument restraining any officer or committee of the Exchange from performing his or its duties under the By-Laws and Rules shall, by that act, cease to be a member of the Exchange.*"

The total extra cost incident to a delivery of sugar on the Exchange will appear from quotations from a booklet recently issued by Lamborn & Company, who are brokers and members of the Exchange and the Clearing Association, Lamborn himself being a member of the board of directors of the Exchange. This booklet is entitled "Modern Methods of Marketing Cuban Raw Sugar"; and it describes in considerable detail the uses of the Exchange and operations thereon. *And it appears therefrom that the intention to make the Exchange only a rendezvous for speculators in sugar futures, and not a conduit through which sugar shall actually pass from the producer or manufacturer to their customers, is fully accomplished.*

In this booklet under the head "Should the Price of Near-by Futures be the Same as the Cost and Freight Price" (Booklet, pages 10 to 15), it is said:

> It is expensive to deliver or receive sugars through the channels of the Exchange. The idea, therefore, is that the seller will buy back his Exchange contract and sell in the cost and freight market, and that the buyer will sell his Exchange contract and buy in the cost and freight market.

On the same subject it is again said:

> Question. Does it cost more to deliver through the channels of the Exchange than to deliver in the ordinary way?
>
> Answer. Yes.
>
> Question. Why?
>
> Answer. To be safe. Without going into details, the Exchange provides certain guarantees to effectually safeguard the delivery and receipt of sugar. It provides certain machinery of delivery which is somewhat cumbersome in order that it be safe. This is true of all commodity Exchanges.
>
> Question. How much does it cost to deliver on the Exchange?
>
> Answer. *At the present writing, it costs the seller a minimum price of about 11c. and a maximum price of about 16c. to place sugars in warehouse and deliver on the New York Exchange. It also costs buyers about 14 cents to accept delivery on the New York Exchange and redeliver to their own warehouses, or to refiners.*
>
> Question. Is it possible to buy and sell futures on the Exchange without paying this extra expense?

Answer. *Yes. Approximately 6,000,000 tons of sugar were traded in during 1922 on the New York Coffee and Sugar Exchange, but only 55,000 tons were actually delivered through the channels of the Exchange.* Under the rules of the Exchange, the seller of futures may buy back his Exchange contract, thereby being in a position to sell his actual sugars in the open market. The buyer also may sell his futures contract and buy his actual sugar in the open market.

By so doing, they save the unnecessary expense of deliveries and receipts through Exchange channels. It is very simple. The two Exchange contracts cancel each other automatically through machinery provided by the Exchange.

Then, under the heading "How it Works—An Example," it is said:

Let us assume that the original Exchange transaction was made at $5.00. Let us further assume that as the time for liquidation arrives the cost and freight market is still at $5.00. If delivery is made on the Exchange, the seller must pay, let us say, 16c., so that he will net only $4.84. The buyer if he accepts delivery must also pay 14c. for delivery charges, so that his cost would be $5.14.

Normally, the seller would be glad to buy on the Exchange at $5.00 and sell in the cost and freight market at this price, thereby saving the cost of making delivery. Normally, the buyer would be glad to sell at $5.00 and buy in the cost and freight market at this price, thereby

saving cost of taking delivery. But it sometimes happens that it would be very embarrassing to the buyer to accept delivery. The seller is in a much better position to make delivery, and if he knows he has the advantage, which he sometimes does, he can sometimes buy back his contract at a lower price than the cost and freight price. Regardless of the fact that it costs the seller, say, 16c to make delivery, it costs the buyer 14c to accept delivery. If the seller gives notice of delivery, the buyer must sell within twenty minutes or accept delivery. If he accepts, it will cost him 14c. Any amount less than 14c below the cost and freight market (where he will buy if he sells futures) will be a saving. Possibly, the buyer might not wish to tie up money at that particular time and would let the seller have the contract at $4.86, or the full 14c under the cost and freight market. A speculator might get panicky and accept even less. In the above case the seller would sell his actual sugar for $5.00 to which would be added this 14c profit. The seller would have made 14c more than expected and the buyer 14c less. The reverse also may be true. The buyer might be in a better position to accept delivery than the seller was in to make delivery. The advantage would then be with the buyer. Regardless of the fact that it costs the buyer 14c to accept delivery, it costs the seller 16c to make delivery. If the buyer thinks the seller can not make delivery, due to delayed arrival of raws, or for any other reason, the buyer will not sell his

> futures and buy cost and freight at par. The buyer will try to get a higher price for his futures than the cost and freight market. The seller might locate a lot of cost and freight raws that he could deliver, but this would cost 16c. Any amount less than 16c above the cost and freight market (where he would sell if he buys futures) would be a saving. The seller might not wish to buy a round amount of cost and freight sugars to deliver against a small amount of futures and, therefore, might pay $5.16, or the full 16c premium over the cost and freight market. A speculative seller might get nervous and pay even more. (Booklet, pp. 12–15.)

Under the caption "Extremes Above or Below Cost and Freight Should Not Govern Your Futures Transactions" (Booklet, pp. 15–18), the author of this booklet further says:

> We have shown that with the cost and freight market at $5.00 futures might sell at or slightly lower than $4.86 or as high as $5.16—possibly a little higher. The price will always be a reflection of the composite views of the interested buyers and sellers. While the obvious would be for buyers and sellers to liquidate futures at the exact price of the cost and freight market, thereby giving advantage to neither buyer nor seller, this can not be made compulsory and still have a free market. Human nature will have its fling. The buyer will try to outtrade the seller in making him think that he will accept de-

livery and the seller will try to outtrade the buyer and try to make him think he will make delivery. Buyers and sellers in the Sugar Exchange market are no different from buyers and sellers the world over. The buyer is always trying to buy low and the seller to sell high. These are natural instincts. *They can not be stifled. The safety valve is that every time the seller makes the buyer take delivery or the buyer makes the seller make delivery, they are both penalized by the respective costs of making and taking delivery.*

No one delivers or receives on the Exchange because they want to pay these extra expenses. It is a question of delivering small quantities through the Exchange in order to try to outguess the other fellow. For example, say a seller has sold 5,000 tons on the Exchange. The month for delivery arrives. If he can not repurchase at about the cost and freight market, he may issue delivery notice for, say, 500 tons. He will risk spending 11c. to 16c. per 100 pounds extra on 500 tons to improve his chances of buying back the other 4,500 tons at or below the cost and freight market. It may work. On the other hand, if the buyer thinks he can outguess the seller, he will accept delivery of the 500 tons. The buyer will risk spending 14c. per 100 pounds extra on 500 tons, with the object of discouraging the seller and making him pay above the cost and freight market for the other 4,500 tons.

From the above it would seem conclusive that the extremes above and below the cost

and freight market should not govern your course of action.

It seems very certain that no such large volume as nearly 6,000,000 tons of sugar could have been traded in during 1922, if every time the seller sold at, say, $5.00, and the buyer bought at, say, $5.00, they figured that with the cost of making and taking delivery they were selling at $4.84 and buying at $5.14. If every Exchange sale was made on the premise by the seller that he would net 16c. less than the Exchange price, and on the premise by the buyer that it would cost him 14c. more than the Exchange price, there would be a difference of 30c. between the net to the buyer and the net to the seller at the same Exchange price. This difference, if figured by every seller and every buyer, would have seriously reduced the volume of business. That buyers and sellers have thought correctly in not figuring the full cost of making and taking delivery, is shown by the fact that *less than 1 per cent of the volume of trading resulted in deliveries through the Exchange channels.*

A person making a limited number of transactions might consider deducting from the selling price the cost of making delivery, or adding to his buying price the expense of taking delivery. The fewer the number of transactions, the safer this would make it. The more constantly the Exchange is used, the safer it would be to figure that while the cost and freight market will not always be the same as the *near-by* Exchange deliveries—

> sometimes being a little higher and sometimes a little lower—on the average it will work out about the same as the Exchange market.

It is apparent, therefore, that the Exchange was intentionally so organized and controlled as to prohibit the making of deliveries pursuant to contracts made thereon; and that it was established solely for the purpose of trading or speculating in futures, with no expectation or intention that the contracts entered into on the Exchange should be consummated by a bona fide compliance with their terms.

III.

Relation between the prices of near-by futures on the Exchange and prices in the cost and freight market.

As there is no trading in spot sugar on the Exchange, the spot prices are controlled by the prices of the near-by futures.

That the Exchange prices govern or vitally affect the spot prices of sugar in the cost and freight market is really undisputed; but the court's attention is specially called to the following evidence upon the subject.

In an interview which Maj. L'Esperance, a special assistant to the Attorney General, had with Mr. Stroud, superintendent of the Exchange, Mr. Stroud said: "*The transactions on this Exchange every day fix the price of sugar for the entire world; the refiners do not make a move until this Exchange opens in the morning.*" (R. p. 169.)

Mr. Post, of the National Sugar Refining Company of New Jersey, states: "That the prices which said corporation [the National Sugar Refining Company] has been compelled to pay for raw sugar required in the conduct of its business are strongly influenced, and at times seemingly controlled, by the prices established as a result of transactions in 'futures' taking place from day to day on the floor of the New York Coffee and Sugar Exchange (Inc.); that the rapidly advancing price of raw sugar since February 1, 1923, has necessitated correspondingly rapid increases in the price of refined sugar." (R. p. 126.)

The same statement in effect is made by Mr. Babst, of the American Sugar Refining Company (R. p. 123); Mr. Jamison, of Arbuckle Brothers (R. p. 122); Mr. Lowry, of R. Atkins & Company (R. p. 125); and Mr. Smith, of the Federal Sugar Refining Company (R. p. 120).

Bearing upon this subject, in Lamborn & Company's booklet, it is said:

> If this is done [the seller buy back his contract and sell in the cost and freight market] when the Exchange prices and the cost and freight prices are identical, then both buyer and seller of the original futures contracts have changed their futures contracts (on which there is the cost of making and taking delivery) to raw sugar cost and freight, at the total price of their original futures contracts.
>
> Theoretically it should be possible to buy or sell futures for nearby delivery at approxi-

mately the same price that you would pay or obtain in the open market for the actual commodity. That is, if you had sold futures and when the delivery date approached if you wished to buy back the contract you had sold, you should be able to do this at about the price then ruling in the raw market cost and freight New York.

But this is where theory and fact part company. As you will see by the accompanying charts there is usually a slight difference between the cost and freight market and the nearby futures market, although the two markets keep returning to equality. There is no such thing as an average variation. The variation, however, is rarely more than slight. The variation would probably be even less if none but refiners and raw sugar producers used the Exchange, but speculators can not be kept out of the market. To be of value, it must be free. (Booklet, pp. 10, 11.)

And again:

Those who use the Exchange more or less constantly can, we believe, with considerable safety consider that the cost and freight market—sometimes being a little higher; sometimes a little lower—will on the average work out *about* the same as the Exchange market. To one making a very limited number of transactions it would probably be safest to allow a margin or difference between the Exchange price and the cost and freight market. The amount of this margin or difference might be determined by the cost of

> making delivery on the Exchange if a seller, or accepting delivery if a buyer. (Booklet, p. 11.)

On pages 14 and 16 of the booklet are two charts which show the close relationship between the cost and freight market prices and the prices on the Exchange. In connection with a table showing spot prices of raw sugar on the several dates from February 1 to April 21, 1923, Mr. Diercks says:

> I give below the *spot* prices in New York on each of said days, from which it will be seen that the price for spot sugar rose concurrently with the advances in futures and with the refiners' advances for refined sugar. No spot sugar is sold on the Exchange, *but the Exchange keeps a record of prices as determined each day by its Sugar Committee, for purposes of settlement in accordance with Sugar Trade Rule 50, hereinbefore set forth.* (R. 76.)

And a comparison of the tables (R. pp. 20, 76) does show, as said by Mr. Diercks, that spot prices and prices of futures fluctuated in the same way, though not always to the same extent. This table will be again referred to hereafter.

The foregoing evidence shows that the prices of sugar in the market both for immediate and future delivery are controlled entirely by the prices upon the Exchange, although there may be a slight difference between the spot price and the price of the nearest future.

IV.

Contracts on the Exchange.

1. Hedging Contracts.

The foregoing facts and deductions therefrom will be helpful in discussing intelligently the different classes of transactions upon the Exchange. Consideration will first be given to hedging contracts.

With reference to such contracts it is said in the answer:

> That a large part of the total volume of trading in sugar for future delivery in the exchange room of said Exchange, as above described, consists of contracts made by producers of sugar, refiners, merchants, and other consumers, *who make such contracts entirely for the purpose of insuring themselves against price fluctuations, respecting sugar either owned, sold, or purchased by them, for the purpose of merchandising or shipping to consuming markets or refining, or using in manufactured products in which sugar is used, and that in most cases such contracts for future delivery are fulfilled by the making of counter contracts to offset the ones originally made; the actual sugar which such future contracts were based upon being sold or disposed of to refiners or others.* (R. pp. 40, 41.)

Mr. Diercks, president of the Exchange corporation, says:

> Although it is impossible actually to state the proportion, since it is within no single man's knowledge or means of knowledge, I am

convinced that the greater part of the trading in sugar on the floor of the Exchange represents transactions legitimately made by producers, dealers, or consumers of sugar for the purpose of protecting themselves from fluctuations in value of the sugar which they own or have bought or intend to buy. The quantity of sugar dealt in on the Exchange necessarily is many times larger than the amount of sugar actually involved in commercial operations, for the reason that three or more owners or handlers of such sugar may seek the benefits of future trading to protect them in their legitimate business. (R. p. 68.)

Mr. Bennett, first vice president of the Bank of America, says:

> We are always willing to loan to a greater extent against sugar purchased or owned by the borrower if any loss due to a decrease in the value of the sugar is protected by sales of "futures" on the Sugar Exchange, because such sales afford protection against possible loss arising from marked fluctuations in price. We, therefore, regard the opportunities which the Sugar Exchange gives for the making of future contracts as a valuable economic function and of great importance in connection with the normal trade in sugar. Such contracts for future delivery, in our opinion, have the effect of stabilizing the market, tending to prevent sudden fluctuations. (R. p. 89.)

Similar statements are made on behalf of defendants by Bernard D. Forster, vice president of the Bank of Manhattan Company (R. p. 89); Walter F.

Frew, president of the Corn Exchange Bank (R. p. 90); Joseph W. Harriman, president of the Harriman National Bank (R. p. 91); William N. Kingsley, vice president of the United States Trust Company (R. p. 91); H. J. Cook, vice president of the Equitable Trust Company (R. p. 92); F. J. Leary, vice president of the Central Union Trust Company (R. p. 115); and E. W. Stetson, vice president of the Guarantee Trust Company (R. p. 115). Defendants also introduced statements by Charles Godchaux, president of the Godchaux Sugars (Inc.) (R. pp. 93, 94), and Horatio B. Young, secretary of the W. J. McCahan Sugar Refining and Molasses Company (R. pp. 94, 95), to the effect that they sometimes purchase future requirements on the Exchange and frequently protect themselves by selling contracts for future delivery on the Exchange; and also introduced the statement of Charles C. Dupratt, of the American Beet Sugar Company (R. p. 93), to the effect that their concern had not yet protected itself against fluctuations in the price of sugar by selling contracts on the Exchange, but had been considering doing so; and that in his judgment the Exchange "fulfills a great economic function and facilitates the marketing of the sugar crop by keeping the producing and consuming public advised of the trend of world opinion with respect to prices." Mr. Strauss, chairman of the board of directors of the Cuba Cane Sugar Corporation, "one of the largest single producers of raw sugar in the island of Cuba," says "We find opportunities afforded by the New York

Coffee and Sugar Exchange for making contracts for the sale of futures advantageous and useful in our business by permitting us to limit our risks on the fluctuations of the market" (R. p. 116). Twenty-six members of the Exchange say that to their personal knowledge the greater part of the transactions on the Exchange in which they and their firms have participated "constituted hedges made by parties who were actually engaged in the producing, handling, or distribution of sugar for the protection of actual sugar transactions" (R. pp. 84, 85). Manifestly, therefore, defendants realize that the justification, if there be any, for the existence of the Sugar Exchange is in the fact that the Exchange affords to *bona fide* sellers or purchasers of sugar an opportunity to secure themselves against loss, which it is claimed is done by means of hedging contracts.

In the first place, defendants are undoubtedly mistaken as to the ratio between hedging contracts and those that are purely speculative. There is some permanency about a hedging contract. It is not canceled on the day it is made but is carried probably for two or more months. The table on page 23 of the record shows the number of contracts made during each month from November, 1922, to March, 1923, inclusive, and also the number carried over from each preceding month. There were generally about twice the number made as were carried over, and in February, 1923, there were about seven times, and in March about four times as many made as had been carried over. All this clearly shows that

purely speculative contracts are always in excess of those made for hedging purposes, and for the latter months mentioned they were greatly in excess.

But as so much stress is laid upon hedging contracts, let us study them carefully and ascertain their functions and effect.

In all illustrations it will be assumed that the cost and freight price and the Exchange price are the same, as is assumed in the examples given by Lamborn & Company, and also by Meinrath Brokerage Company, to which reference will be hereafter made.

The several classes of hedging contracts will be considered separately.

1st. Selling Sugar.

(*a*) *Selling futures on the Exchange in anticipation of actual sales to be made outside the Exchange.*

In such a transaction, of course, the seller never intends to make an actual delivery but to cancel the sale by a subsequent contract of purchase on the Exchange of a like quantity.

Suppose it is January, and a cane grower or grinder expects to have 100 tons of sugar for delivery in May; the price for May deliveries is $5.00 per hundred pounds, and he is willing to accept that price for his anticipated production. He then sells upon the Exchange 100 tons at $5.00 per hundred. This is called a short sale, because he does not then own the sugar. When May arrives suppose the price has declined to $4.50 per hundred. He then buys

100 tons on the Exchange at $4.50 and cancels his contract, receiving a margin of 50 cents per hundred profit, and he sells his real sugar outside the Exchange upon the cost and freight market at the prevailing market price of $4.50 per hundred. This added to his margin of profit makes $5.00 per hundred, or the price at which the future sale was made in January.

Again, suppose that the price has advanced to $5.50; then the seller will buy on the Exchange 100 tons at $5.50 to cancel his contract at $5.00, and will lose 50 cents per hundred; but he will sell his real sugar on the cost and freight market at $5.50, or 50 cents more than the price in January; and the 50-cent loss on the Exchange transaction is offset by the 50-cent advance in the market. *In both of these instances the seller receives exactly the price he would have received in January in a bona fide sale of sugar to be delivered in May, but has had to pay the commission on two transactions on the Exchange.*

The above illustration is in substance the same as those given in the booklet by Lamborn & Company. Let us examine those illustrations somewhat minutely. The first one illustrates hedging "to predetermine a colono's profit." (Booklet, pp. 23–25.) A colono is a cane grower in Cuba; and he may want to sell his anticipated crop for delivery at the time it will be converted into sugar. It is there assumed that the colono will have 500 tons of sugar, and that the March price on the Exchange is $5.00, from which

is deducted 30 cents for the cost of placing the sugar in New York, leaving $4.70, which is called the promedio price. The problem is thus solved for both a declining and an advancing market.

If promedio price declined to		$3.70
You should pay in covering futures about	$4.00	
Price at which you sold futures	5.00	
Add profit on Exchange hedge		1.00
Total price as predetermined		4.70

This is what you set out to effect, i. e., of having your profits based on a promedio price of $4.70.

If the reverse situation exists and sugar has advanced let us say to $6.00, you will take a loss of $1.00 per 100 pounds in covering your futures sale, but the promedio price should also be $1.00 higher, or $5.70. This is the way to figure your receipts in this case.

If promedio price advanced to		$5.70
You should pay in covering futures about	$6.00	
Price at which you sold futures	5.00	
Deduct loss on Exchange hedge		1.00
Total price as predetermined		4.70

In one case the market declined after your hedge and in the other case it advanced, but in both instances you obtained the price you figured on when you hedged.

If at the time your cane was being delivered to the Central, there had been no particular change in the price of futures, you should make no profit or loss on your Exchange transaction. But you would have had the assurance that had the market declined you would still have received a satisfactory figure for your cane (Booklet, p. 25).

It is thus made to appear that the colono is enabled by these transactions on the Exchange to secure in March the price which sugar for March delivery is bringing at the time he desires to make the sale. *But what would the figures be should the colono then sell his* ACTUAL *sugar at the prevailing price for delivery when the sugar shall be produced in March? By such a contract every item in both calculations would be eliminated except the result, to wit, "total price as predetermined, $4.70."*

There is then illustrated with figures a little more complicated "Hedging to determine a central's profit when grinding colono cane." (Booklet, pp. 26–28.) A central is one who grinds the grower's cane. He contracts to give to the grower sugar to the amount of a certain per cent, say from 5 to 7 per cent, of the weight of the cane, or to pay him the promedio price for that quantity of sugar. The rendement is the per cent of the cane that is converted into sugar. In this problem it is supposed that the colono has brought the central 10,000 tons of cane; that the rendement is 10 per cent, of which the colono is to receive 5 per cent, or one-half, and that therefore the central will have 500 tons against which to hedge by selling March futures at $5.00 per hundred pounds. It is also assumed that it will cost the central $2.00 per ton, or $20,000, to grind the cane and 50 cents per hundred pounds, or $5,600, to place the sugar in New York—not in an exchange warehouse, however, because it is not intended that the sugar shall ever be

delivered through the Exchange. The problem is then solved as follows:

Hedges by selling futures at		$5.00
If the Exchange market declines to		4.00
Price of sugar C. & F. N. Y. should decline to about		4.00
Profit on hedge $1.00 per 100 lbs. or total of	$11,200	
Price central would receive for 500 tons of actual sugar at $4.00 C. & F	44,800	
Gross receipts		56,000
Cost of manufacture	20,000	
Cost of placing C. & F	5,600	
		25,600
Total profit on all transactions		30,400

Though the market declined as anticipated, the central secured the total profit of $30,400, because of their hedge at $5.00.

Suppose the market advanced, instead of declining, let us say to $6.00. The price of actual sugar C. & F. N. Y. should be about $6.00.

Price central would receive for 500 tons of actual sugar at $6.00 C. & F		$67,200
Cost of manufacture and placing C. & F	$25,600	
Loss on hedge	11,200	
		36,800
Total profit on all transactions		30,400

And then it is gravely said:

> It will again be noted that the central secured the total profit of $30,400, which they had previously determined was a satisfactory one when they hedged at $5.00.
>
> In each case the result is the same. The central by hedging predetermined the amount of their profit. * * * Whether the market declines, advances, or stays the same, the central by hedging is able to predetermine the approximate amount of their profit.

But why is this done *by hedging?* He could have determined it just as certainly, and without the expense of the Exchange transactions, by making a *bona fide* sale of his sugar for delivery in March. In case he had made such a contract the solution of the problem would be as follows:

500 (long) tons of sugar, at $5.00 per 100 lbs		$56,000
Cost of manufacture	$20,000	
Cost of placing C. & F.	5,600	
		25,600
Total profit on all transactions		30,400

Another problem of precisely the same character is stated and solved to illustrate "Hedging to determine a central's profit from administration cane." (Booklet, pp. 29, 30.) And by the same simple process it can be shown that hedging contracts on the Exchange for the purpose suggested are absolutely useless.

Many a colono and central has doubtless been made to believe that these two transactions on the Exchange, one the purchasing of futures and the other buying them back at the time specified in the contracts for delivery, which require the payment of commissions to his broker, were absolutely necessary for him to secure with certainty the price sugar was then bringing for delivery at the time specified in the Exchange contract of sale.

Let us again suppose that one who sells his May futures at $5.00, instead of waiting until May to buy back his contract, concludes that he will buy in March when the price has dropped to $4.75. If

it continues to drop until it reaches $4.50 in May, when he is ready to deliver his sugar, he pays on the Exchange 25 cents less than the price at which he sold, and therefore clears a margin of 25 cents; but he loses 50 cents in May on his actual sale of sugar in the cost and freight market, and his net loss therefore is 25 cents.

If, however, when he buys in March the price has increased to $5.25 and it continues to rise until it reaches $5.50 in May, in buying back and canceling his contract on the Exchange he pays 25 cents more than the price at which he sold and loses on the Exchange 25 cents, but he makes 50 cents on his sale of actual sugar in the cost and freight market, and his net gain, therefore, is 25 cents. *But the transaction possesses all the elements of chance incident to a sale or purchase upon the Exchange for the sole purpose of speculation.*

In fact, in hedging it is not the Exchange transaction that stabilizes the deal in actual sugar, but it is the ownership and sale of the sugar that makes certain the result of the Exchange transaction.

(b) *Selling sugar in the cost and freight market and buying futures on the Exchange.*

This is merely suggested in Lamborn & Company's booklet (Booklet, p. 20), and no problem is worked out to illustrate such a transaction. It is there said:

> When futures are selling at a discount you are also presented with an opportunity. Under these circumstances, when the discount

> has become sufficiently attractive, your chance for profit lies in selling your sugar and replacing by buying futures. By doing this you secure cash for your sugar; and if the market rises as anticipated, you approximate the same result as though you had held your sugar.

If such a transaction is called a hedge it is nevertheless nothing other than a straight speculation in futures. If the price goes up the transaction *on the Exchange* will be profitable, because the owner of the sugar buys futures at a lower price than he will pay; but if he should misjudge the market, and it should continue to decline, he would lose, because he pays a greater price than he will receive when he sells; and in either case "*you approximate the same result as though you had held your sugar,*" though the writer is careful to make such suggestion only in connection with a rise in prices.

Of course, if the market should continue on a decline he could sell and avoid further loss, just as is done in connection with any other speculative transaction on the Exchange.

2nd. Buying Sugar.

The Meinrath Brokerage Company manifestly has a large clientage, and is seeking a larger one, of buyers of refined sugar; and they have issued a pamphlet entitled "An outline of the opportunities, advantages, and manner of operating in refined sugar futures on the New York Coffee and Sugar Exchange," a copy of which is filed by defendants with the affidavit of Mr. Charles D. Budd, jr., a

member of the firm. This pamphlet, like that issued by Lamborn & Co., is not printed in but constitutes a part of the record; and a copy is furnished each member of the court. Hedging contracts from the standpoint of the buyers of sugar are described in this pamphlet under the following headings: "Hedging to determine a loss," "Hedging to determine a profit," "Hedging to eliminate a purely speculative profit or loss," and "Hedging to protect against future sales of manufactured products," there being two examples under the last heading, one of a buyer and the other of a seller.

As the first two illustrations deserve the more careful attention, consideration will first be given to the third, fourth, and fifth examples.

(1) The third (Hedging to eliminate a purely speculative profit) is the seller's hedging contract, to insure that he will get the prevailing future price for his sugar, reversed. Green & Co. on May 1 buy in the cost and freight market 2,400 bags of granulated sugar at $8.00 per hundred pounds, to be delivered in July. At the same time they sell *on the Exchange* the same quantity at the same price. If the price advances $1.00 by July they will lose a dollar per hundred on the Exchange contract, because it will cost them that much more to buy their contract back than the price at which they sold, but they can realize on the sugar actually bought $1.00 per hundred profit, which will cancel the loss.

But here it is apparent that if Green & Company are manufacturers of candy or preserves or canned

goods, and want to use their sugar and not sell it, they will lose just a dollar a hundred in the gamble on the Exchange. So if they are wholesale grocers they will doubtless sell their sugar in the trade at a price based on the price which they had contracted to pay, and will suffer the same loss.

Suppose, however, the price declines $1.00; then G. & Co. will make $1.00 per hundred on their exchange contract, because they will buy their contract at $7, but their actual sugar will be worth $1.00 less than they paid for it. If they have sold their sugar in the trade, or the goods, into the manufacture of which the sugar has entered, on the basis of $8.00 per hundred pounds for sugar they will clear $1.00 per hundred; but this profit is derived from the purely speculative contract on the Exchange, just as is the loss if the price advances.

(2) In the fourth example G. & Co. are assumed to be canners of peas, and they want to sell in January and February for future delivery peas in the canning of which sugar will be used that is bought for delivery in May. It is based on the assumption that there is no market outside the Exchange in which sugar can be bought for delivery in May, which is assumed not to be the fact in the other examples given. Anyway, it is not strictly a hedging contract, because G. & Co. are *compelled* to make it, as it is supposed that it is the only way they can purchase sugar. They buy on the Exchange the May futures at $8.00. If the market advances to $9.00 they sell their contract at that price, making $1.00 per hundred pounds, and take

the $9.00 and buy sugar in the cost and freight market at that price, thus obtaining the same quantity of sugar their Exchange contract called for at $8.00.

If the market recedes $1.00 they lose that much in the Exchange transaction, because to cancel their contract they sell at $1.00 less than they paid; but they buy the sugar in the cost and freight market at $7.00, and therefore get the same quantity as that called for in their contract on the Exchange. But the same result would follow if they made a *bona fide* contract for the sugar to be delivered in May; and they would not have to pay a commission on two transactions.

(3) The fifth example is one of pure speculation. There G. & Co. are candy manufacturers; and after they have made a quantity of candy they fear that the price of sugar will decline; and they therefore sell on the Exchange an amount of sugar equivalent to that used in making the candy, for delivery on a near-by future date, at, say, $7.90. If contrary to expectation the market advances G. & Co. must run to cover by buying immediately the same quantity they have sold, suffering, of course, some loss. But if their judgment is correct and the market declines, say, to $7.00, then G. & Co. can buy at that price and cancel their contract at a profit of 90 cents. And it is said: "There would unquestionably have been some declines in the candy market, but Green Bros. would have protected themselves against these declines, at least to the extent they had hedged on the Exchange. Of course, they were not obliged to cover by buying

in at seven dollars, but could have held off longer in anticipation of further decline." And so could any other speculator upon the Exchange.

So a manufacturer of shoes or saddles could "protect" himself on the Sugar Exchange in the same way, and to the same extent, if he expected the price of leather to decline. And whether he would lose or make would depend upon whether the price of sugar would advance or decline.

(4) The first example is "Hedging to determine a loss." There G. & Co. on May 1 purchase *from a refiner* a quantity of granulated sugar for July delivery at $8.00. Later in the month the market declines to $7.50. They fear it will decline further, and hedge by selling the quantity they contracted for at $7.45 on the Exchange for delivery in August. If they are mistaken and the market advances *they must cover at once* by buying the same quantity, or lose to the extent of the advance. If the market declines to, say, $6.50 for July delivery and they can succeed in buying at $6.42 for August delivery, they will make on the Exchange transaction $7.45 minus $6.42, or $1.03; but they will sell their real sugar at a loss of $8.00 minus $6.50, or $1.50. Their net loss, therefore, will be $1.50 minus $1.03, or ·47 cents per hundred. Here is again the assumption that G. & Co. do not want to use the sugar, or have not already sold it, if jobbers, which assumption is generally not true unless they are purely speculators; and if they are speculators they don't want the sugar at all.

(5) The second example is "Hedging to determine a profit." G. & Co. buy from a refiner on May 1 for July delivery at $8.00. The market soon advances to $9.00; and G. & Co. want to make sure that they will realize the dollar profit. They can then make the $1.00 per hundred pounds by selling the sugar actually bought, but they must have it in their business in July. They therefore sell the same quantity on the Exchange at $9.00. The result, whether the market continues to advance or recedes, is thus stated:

> In case of further advances, Green & Co. will buy in on the Exchange, with neither profit nor loss, or perhaps a slight loss. They will take the full benefit of the advance in selling the 2,400 bags which are delivered to them by the refiner at $8.00.
>
> If the market recedes from $9.00, returning to $8.00, Green & Co. will cover by buying three lots (800 bags each) realizing a profit of 100 points or $1.00 per bag. They will still have the 2,400 bags to be delivered by the refiner, which cost $8.00 and are salable on a market of $8.00. It is quite apparent that the profit of 100 points which was determined by the Exchange hedge has actually been established and realized.

This illustration applies only to jobbers, because it is said, "They could, of course, resell the 2,400 bags, but bear in mind that this firm *must have that quantity of sugar for actual distribution to their trade in the month of July.*" If they have sold the sugar in the trade on the basis of $8.00 and the price con-

tinues to advance, they lose on the Exchange transaction, and realize no profit from the advance in the cost and freight market. If the price declines they make a profit on the Exchange transaction, just as any other speculator does. *In fact this is not a hedging transaction for so-called protection, but purely a speculative transaction to realize a profit. And as with every other speculative or gambling contract on the Exchange, G. & Co. make a profit if the price of sugar goes the right way and lose if it goes the wrong way.*

Professor Seligman in his "Principles of Economics," which is quoted from by Mr. Gilmour, witness for defendants (R. p. 109), gives another form of hedging. There an English miller is supposed to purchase in February wheat at Chicago which can not be delivered to him in England until September. The price is then 90 cents per bushel, and fearing that it may decline before delivery he sells on the Exchange the same quantity he has bought. When the wheat arrives in September the price has declined to 75 cents, and by buying the same amount on the Exchange to cancel his contract he makes 15 cents per bushel, which offsets his loss on the wheat actually purchased. Of course if in the meantime the price had advanced he would have lost in the transaction on the Exchange, which would have been offset by the gain in the price of the wheat actually bought. In other words, such a form of hedging insures that the purchaser will get the wheat at the market price at the time of its delivery plus the

broker's commission on the two transactions; and the same result could have been accomplished without paying the commission by stipulating in the contract that the purchaser would pay the market price prevailing when delivery is made.

Considering all the examples given by Lamborn & Company and Meinrath Brokerage Company and Professor Seligman, the obvious thing is that the hedger has made, or contemplates making, the *bona fide* contract in the *real sugar market*, where *sugar* is *actually* bought and sold. He doesn't have if a seller, and doesn't want if a buyer, the sugar at the present time; but will have it or will want it at a future date. He claims he is not a sugar speculator, but wants "protection." And from these examples it appears there are a diversity of desires upon the part of these sellers and purchasers. One buyer wants it to be made certain that he will get the sugar at the then prevailing price for a specified future delivery; another wants a guarantee that he will get it at the market price prevailing at the time of delivery; another wants, if the price starts downward, to be guaranteed that he will not suffer any further loss; and another wants, if the price has gone up, to be guaranteed that he will not lose the then speculative profit by a decline before the date of delivery; and still another, whose sugar has been converted into candy, wants to make in a transaction on the Exchange enough to offset any depreciation in the value of his candy, should the price of sugar decline. The wants of the sellers are about the same,

but are figured out in the reverse way. Those who want it made certain at what price they will sell or purchase sugar on the delivery date can easily obtain what they desire without any use of the Exchange. The one can make a simple contract to take and the other to accept so much sugar at a certain time at the stipulated price. The others who want "protection" are purely speculators. They have in their business the same risks as many other business men, who produce the raw material, or who as manufacturers or jobbers buy supplies needed in the future. The manufacturer of furniture must buy his supply of lumber in advance and sell his goods for future delivery. The manufacturer of shoes must do the same with reference to the leather he needs and the shoes he makes. And the foundryman has to buy his pig iron months in advance, and contract for the future delivery of his product. The furniture maker, the shoe manufacturer, and the foundryman had as well go upon the Sugar Exchange and speculate to save himself against a probable loss, or assure a profit, as the manufacturer of candy or the jobber of sugar. The only difference is that the article dealt in is not in the line of the furniture or shoe manufacturer or foundryman; but the hedging contract of the candy maker is just as distinct from the real contract for sugar as the foundryman's contract on the Exchange would be from his real contract for pig iron.

But the protection is more imaginary than real. As above demonstrated, if the buyer has purchased

sugar for future delivery and the price has declined and he wants to protect himself against further loss by selling, or if he has bought and the price advances and he wants to be sure to realize the profit arising from the advance by then selling, he has to put himself absolutely in the hands of his broker. If when he sells the price starts or continues upward he must buy immediately and sell again when it starts downward. Absolute protection would require a transaction every time the price fluctuated on the Exchange, which, as will be hereafter shown, is practically every day. So at the end of the game the broker's commission would probably about equal the value of the sugar.

Moreover, during periods of excitement on the Exchange it is exceedingly unsafe for a producer of sugar to anticipate its future sale by selling futures on the Exchange. For illustration, take the period from February 1 to February 14 last; and suppose that a colono on February 1 expected to have 500 tons of sugar in September, and sold on the Exchange 500 tons for September delivery to secure the prevailing price of September futures. When the sale was made on February 1, the colono was required to put up a margin of $2,500. Because of the increases in price (see Table R. p. 18) the amounts of margin the colono was compelled to have on deposit from day to day during that period were as follows:

February 2	$3,844
February 3	3,508
February 5	3,060

February 6	$4,976
February 7	5,524
February 8	6,868
February 9	9,444
February 10	14,484
February 13	25,684
February 14	22,592

The value of the 500 tons of sugar on February 1, 1923, was $43,008, and on February 13, $66,192, which was an advance of $23,184. Therefore, if the additional margin of $11,200 had not been put up when called on the 13th his sale would have been canceled, his deposit of $14,484 appropriated, and he would have been charged with an additional sum of $8,700.

Under such conditions instead of endeavoring to relax the strain upon the *bona fide* traders who have entrusted their interests to the members of the Exchange, every step taken is designed for their own protection regardless of how greatly it may increase the burden upon those whom they represent. Thus while the required margin on February 1 was on the basis of $250 per lot, because of the advance the basis was increased to $400 on February 14, to $500 on February 16, and to $750 on April 20.

2. Contracts Admitted to be Purely Speculative.

With reference to such contracts it is said in the answer:

> That another large part of said future trading in said exchange room consists of contracts made by or for so-called speculators, persons who have capital and make a study of trade conditions affecting prices, and endeavor to

forecast the future prices of sugar and profit thereby, through the making of such contracts for future delivery. (R. p. 41.)

Mr. Diercks also says:

In addition to these actual business transactions in connection with the movement and distribution of the crop, which I believe that even the Government representative will concede to be strictly legitimate and proper, there are transactions in futures on the floor of the Exchange by persons of large capital who study the sources of information with regard to consumption and production and forecast the probable course of prices of the commodity. Such persons make contracts for future delivery on the Exchange with the purpose and intention of taking advantage of the change in price in the event that their forecast of conditions is correct, running the risk of grave loss in the event that their forecast is incorrect. Speculation of this sort is of a most useful character. (R. p. 69.)

And again:

It is true that in addition to these men of capital and intelligence who thus speculate in futures there is some trading in futures by persons without the same degree of capital or intelligence who make future sales or purchases for the excitement and gamble, and that this class of speculation is undesirable and harmful to those who indulge in it, and usually results in a loss to the person so trading, but this class of transactions is in my opinion from my knowledge of transactions

on the Exchange relatively immaterial in volume. (R. p. 70.)

It is not pretended that any member of either of these classes, when he makes a contract of sale or purchase, has any intention to deliver or receive actual sugar. The former trade with the "intention of taking advantage of the change in price" and the latter trade and purchase "for the excitement and gamble." Both classes are concerned only about the margin of profit or loss.

According to the allegations of the answer and the sworn statement of Mr. Diercks, the president of the the Exchange, all transactions on the Exchange belong to the foregoing classes.

It therefore is subject to absolute demonstration that practically all of the contracts, if not every contract, on the Exchange is unlawful and unenforceable under the rules of law laid down by this court, and recognized by all courts as the law governing such transactions.

As heretofore said, defendants justify the existence of the Exchange and Clearing Association because of the opportunity it gives for hedging, or "protection," as they call it. They concede that the other classes of contracts described in their answer, and in the statement of the president, *are made for speculation.* Then let it be supposed that every contract made on the Exchange during a day's session are made for hedging by those who intend to cancel them by subsequent contracts on the Exchange, and who have made, or intend to make, collateral *bona fide* contracts outside the Exchange.

In *Irwin* v. *Williar*, 110 U. S. 499, 508, this court said:

> The generally accepted doctrine in this country is, as stated by Mr. Benjamin, that a contract for the sale of goods to be delivered at a future day is valid, even though the seller has not the goods nor any other means of getting them than to go into the market and buy them; *but such a contract is only valid when the parties really intend and agree that the goods are to be delivered by the seller and the price to be paid by the buyer; and, if under guise of such a contract, the real intent be merely to speculate in the rise or fall of prices, and the goods are not to be delivered, but one party is to pay to the other the difference between the contract price and the market price of the goods at the date fixed for executing the contract, then the whole transaction constitutes nothing more than a wager, and is null and void.*

And in the syllabus the principle decided is thus stated:

> If under guise of a contract to deliver goods at a future day the real intent be to speculate in the rise or fall of prices, and the goods are not to be delivered, but one party is to pay to the other the difference between the contract price and the market price of the goods at the date fixed for executing the contract, the whole transaction is nothing more than a wager, and is null and void.
>
> When a broker is privy to such a wagering contract, and brings the parties together for the very purpose of entering into the illegal

> agreement, he is *particeps criminis*, and can not recover for services rendered or losses incurred by himself in forwarding the transaction.

This expression of the court was quoted with approval in *Clews* v. *Jamieson*, 182 U. S. 461, 489–490, and the court there further said:

> As a sale for future delivery is not on its face void, but is a perfectly legal and valid contract, it must be shown by him who attacks it that it was not intended to deliver the article sold, and that nothing but the difference between the contract and the market price was to be paid by the parties to the contract. And the fact that at the time of making a contract for future delivery the party binding himself to sell has not the goods in his possession and has no means of obtaining them for delivery, otherwise than by purchasing them after the contract is made, does not invalidate the contract. *Hibblewhite* v. *McMorine*, 5 M. & W. 462. Parke, Alderson and Maule, barons, before whom the case was heard, were unanimously of this opinion.
>
> In order to invalidate a contract as a wagering one, both parties must intend that instead of the delivery of the article there shall be a mere payment of the difference between the contract and the market price. *Pearce* v. *Rice*, 142 U. S. 28; *Pickering* v. *Cease*, 79 Illinois, 328. In the latter case it was stated:
>
> "Agreements for the future delivery of grain or any other commodity are not pro-

hibited by the common law, nor by any statute of the State, nor by any policy adopted for the protection of the public. What the law does prohibit, and what is deemed detrimental to the general welfare, is speculating in differences in market values. The alleged contracts for August and September come within this definition. No grain was ever bought and paid for, nor do we think it was ever expected any would be called for, nor that any would have been delivered had demand been made. What were these but 'optional contracts' in the most objectionable sense; that is, the seller had the privilege of delivering or not delivering, and the buyer the privilege of calling or not calling for the grain, just as they chose. On the maturity of the contracts they were to be filled by adjusting the differences in the market values. Being in the nature of gambling transactions, the law will tolerate no such contracts."

And in *Pearce* v. *Rice*, 142 U. S. 28, 40, it was remarked:

"But the evidence before us is overwhelming to the effect that the real object of the arrangement between Hooker & Company and Foote was, not to contract for the actual delivery, in the future, of grain or other commodities—which contracts would not have been illegal (*Pickering* v. *Cease*, 79 Illinois, 328, 330)—but merely to speculate upon the rise and fall in prices, with an explicit understanding from the outset that the property apparently contracted for was not to be delivered, and that the trans-

actions were to be closed only by the payment of the differences between the contract price and the market price at the time fixed for the execution of the contract."

A contract which is on its face one of sale, with a provision for future delivery, being valid, the burden of proving that it is invalid, as being a mere cover for the settlement of "differences," rests with the party making the assertion.

As shown by all the illustrations heretofore given, *in no hedging contract upon the Exchange is an actual delivery of the sugar contemplated, but it is intended that the contract shall be canceled by a corresponding sale or purchase, and that there will be paid or received the margin between the sale and purchase prices. Therefore, during the entire day upon the Exchange everyone who makes a hedging contract to protect a sale, or contemplated sale, and everyone who, on the other hand, makes a contract to protect a purchase, or contemplated purchase, intends precisely the same thing; that is, each one intends to cancel his sale or purchase by a subsequent purchase or sale of the same amount of sugar and the payment of the advance or decline in price. There is absolute agreement upon that subject in the minds of everyone operating on the Exchange.*

In a case which involves a transaction or even a series of transactions between certain brokers on the Exchange, as were the facts in *Clews* v. *Jamieson*, it may be difficult to prove that an actual delivery was not contemplated when such transaction or trans-

actions were had, and the presumption that a delivery was actually intended may not be overcome; *but such presumption is absolutely destroyed when it is conceded that every contract during the day on the Exchange is of such character that no delivery could have been contemplated by either party in the making of any of them.*

Now, if such is the law relating to contracts upon the Exchange when all of them are hedging transactions, a fortiori must the same rule apply when some of the contracts for the day are made by pure speculators, as described in the answer and Mr. Dierck's statement, and all the others are hedging contracts.

The fact that an exceedingly small proportion, considerably less than 1 per cent, of the contracts are consummated by actual deliveries can not prevent the application of the principles of law above stated, because, as explained by Lamborn & Company, they are caused by one speculator driving an opponent into a corner to obtain an advantage over him, when neither of them in fact contemplated making or accepting an actual delivery when the transaction was had.

However, this case does not turn upon the question whether any class of the contracts made upon the Exchange are technically legal, but whether the course of operations upon the Exchange restrains interstate commerce, which will be fully considered hereafter.

V.

The advances in prices of spot and raw sugar from February 1st to the date of the filing of the petition were very largely, if not entirely, the result of speculative operations on the Exchange; and were not justified, or caused by the existing or prospective supply of, or demand for, sugar.

The immediate cause of the filing of the petition on April 9, 1923 was the general and rapid advance in the prices of spot sugar and sugar futures, beginning early in February and becoming particularly marked about February 13th. May futures advanced on the Exchange from $3.65 on February 1st to $5.97 on April 16th, or a total advance within sixty trading days of $2.32 (Pet. R. p. 20); while spot sugar advanced from $3.52 on February 1 to $5.89 on April 16, a total advance of $2.37 (Diercks, R. p. 76). The theory of the petition is that those advances, and the corresponding advances of futures for other months, were not justified by the actual conditions existing in the sugar market, but were at least very substantially the result of pure speculation on the Exchange.

However, the bearing that this increase in the price of sugar and the evidence relating thereto have upon the real question at issue should be kept in mind. Though it were found that a shortage in sugar did exist, which justified an increase in prices, such fact would not be determinative of the case. The question is, Does the Exchange *as organized and operated* unduly enhance or reduce the price of sugar? Do

manipulations and speculations on the Exchange at times substantially retard the effects of natural economic laws, and at other times unduly stimulate and enhance them? In other words, are prices substantially affected by speculations on the Exchange, (1) by increasing or diminishing the results that would naturally flow from actual market conditions, or (2) by the creation in the minds of speculators imaginary conditions which excite them to greater activity, or (3) by the stimulation of trading from causes which have no relation to the supply of and demand for sugar? It is apparent, therefore, that the causes of the fluctuations in the prices of sugar immediately preceding the filing of the petition are not themselves the issue; but the evidence relating thereto has a very material bearing upon the real issue, and as such should be carefully studied.

On February 8 spot sugar was $4.01 and March futures were $4.07; May, $4.07; July, $4.17; and Septemer, $4.23. On the 9th the prices increased as follows: Spot, 20c; March futures, 21c.; May, 25c.; July, 25c.; and September, 23c. On the 10th prices increased, spot, 6c.; March futures, 15c.; May, 29c.; July, 40c.; and September, 45c. The 11th was Sunday, and the 12th was a holiday; and on the 13th the increases over Saturday's prices were, spot, $0.99; March futures, $1.00; May, $1.00; July, $1.00, and September, $1.00; which brought the prices to, spot, $5.26; March futures, $5.43; May, $5.61; July, $5.82; and September, $5.91. (Pet. R. p. 20; Statement of

Diercks, R. p. 76.) The advance in futures on the 13th no doubt would have been greater had there not existed the rule which prohibited a greater increase on the Exchange in one day than 1 cent per pound.

From February 8 to 15 the prices of refined sugar charged by four of the refineries in New York advanced \$1.00 by one, \$1.25 by two, and \$1.30 by one. (Pet. R. p. 21.)

One contention in the answer is that the leap of \$1.00 per hundred pounds in the price of all futures, and of 99c. per hundred on spot sugar on the 13th was due to the publication on February 12 of an estimate of the sugar crops made by the Department of Commerce. (R. pp. 54, 55.)

But this contention is not consistent with the claim subsequently made in the answer, "that the recent advance in the prices of sugar is wholly due to the judgment and opinion of those who deal in said commodity and make a study of the conditions surrounding its production and consumption." (R. p. 61.)

According to the rules in the charter one object of the Exchange corporation is "to acquire, preserve, and disseminate useful and valuable business information" in regard to the sugar trade.

Mr. Gilmour, a witness for defendants, in speaking of how prices are reached upon the Exchange, says: "The supply and prospective demand, weather conditions, crops, economic conditions, etc., are all studied and considered, and it is the majority

opinion which prevails, whether rightly or wrongly, which makes the price, frequently far in advance of the events which had been anticipated and discounted." (R. p. 104.) And it is claimed, not only by those giving testimony in this case, but by economists who attempt to justify the existence of exchanges, that those who operate thereon carefully investigate the conditions of both production and consumption, and that the prices reflect a composite judgment reached by them based upon such original investigations.

Every operator on the Exchange had had access to every source of information that was open to the Department of Commerce; and nothing appeared in its report with which the members of the Exchange were not familiar. *Then, if the Exchange performs such a useful function in forecasting the future and fixing prices for future delivery, why should the statement issued by the Department of Commerce have produced such agitation in trading on the Exchange?*

But what was the information contained in this estimate of the Department of Commerce, which the answer alleges was "an adequate cause for the abrupt and sudden rise in prices on February 13, 1923"? Those parts of that estimate which are quoted in the answer as constituting the adequate cause are as follows:

> In 1921–1922 the world's sugar consumption was 500,000 tons greater than production, and the prospects are that it will be 700,000 tons greater in 1922–1923. If these prospects

materialize, the heavy accumulated stocks of the end of the 1921–1922 season will have given way by the end of 1922–1923 to a carry over below the pre-war normal figure.

* * * * *

This year starts with another 4,000,000-ton Cuban crop in sight, a big crop in Java, and a greatly increased production in Europe. But various decreases elsewhere, notably in the United States, have brought the world production only 125,000 tons higher than it was last year, to supply consumption needs estimated at 350,000 tons more than in 1922, and 725,000 tons larger than production.

* * * * *

That the estimated production for 1922–1923 was 18,308,000 tons, and the estimated consumption 19,035,000 tons. (R. pp. 54, 55.)

To an intelligent reader who knows something about sugar—the very subject with which every operator on the Exchange is specially familiar—the facts stated meant that the Department of Commerce estimated that there would be 125,000 more tons of sugar produced this year than there were last year, but that there would be 350,000 tons more consumed; that the consumption would exceed the production by 725,000 tons; and that therefore the carry-over would be less than it usually was during the pre-war period. And a glance at the report would have shown that the estimated carry-over was 476,000 tons.

The same information was contained in the headlines and comment of the Journal of Commerce, in its issue of February 10, from which the following is quoted in the statement of Mr. Diercks:

> WORLD SHORTAGE OF SUGAR IS FORECAST—DEFICIENCY FOR 1923 PLACED AT 250,000 TONS—DEPARTMENT OF COMMERCE SAYS CONSUMPTION NEEDS ARE 725,000 TONS ABOVE PRODUCTION, WITH 476,000 TONS CARRY-OVER.

The newspaper article opened with this sentence:

> Washington, Feb. 9th. A World sugar shortage this year of more than 250,000 tons was officially predicted to-day by the Department of Commerce. (R. pp. 74, 75.)

That is, it was estimated that there would be 476,000 tons of sugar more than the world would need. And because there would not be a million tons the world could not consume instead of 476,000 tons, the world woke up on Wednesday, February 14, to find that consumers had to pay a cent a pound more for sugar than was being paid the day before. In other words, there was extorted from the people of the United States about $2,000,000 per week, not because there was any prediction of an actual shortage in sugar, or that there would come a day within the period of time about which anyone would undertake to prophesy, when one would want sugar and there would not be an abundance to meet his every want, but because the margin of excess would be only 476,000 tons.

Previous experience, especially the experience of but t[illegible] [illegible]ars before, taught that the expectation of

an excess of consumption over production would stimulate production for the ensuing year, and would quickly depress consumption; and it was well known that sugar taken from the factories for the year 1921 and 1922 had increased 2,482,000 tons over that taken during the previous year and was 1,180,000 tons in excess of consumption before the war, which clearly indicated that a large stock was being held in reserve by the middlemen and consumers. And therefore not only was the estimated increase of 350,000 tons in consumption not justified, but the probabilities were that it would fall below what it had been the previous year.

Moreover, there was no new information contained in the statement issued by the Department of Commerce. There was not a fact stated therein that had not for some time been known to every man operating on the Exchange or connected with the sugar industry. Mr. Gilmour, an expert witness for defendants, in his argument attempting to justify the advance in the prices of sugar, quotes the following from the issue of the "International Sugar Journal" *for December, 1922:*

PRODUCTION AND CONSUMPTION.

> Last month we published Willett & Gray's preliminary estimates of the 1922–23 world's sugar crops. They revealed, as that eminent firm of statisticians themselves remarked, that there is very little change indicated for any of the important sugar crops of the world, particularly those of cane sugar, which total

practically the same as those of 1921–22. In the Continental United States the output of beet and cane is expected to be some 335,000 long tons less than last year; on the other hand, Europe is expected, bar accidents, to increase the beet sugar output by 644,000 long tons.

The net result of all the sugar crops is estimated by Willett & Gray as at most an increase of some 362,000 tons. Unfortunately, the world is faced by the fact that as compared with last December, the carry-over into 1923 is to be less by the huge amount of one million to one and a half million tons. *Give therefore a maintenance only of the 1922 demand for consumption, a shortage will develop during 1923 which is bound to send the price of sugar up still higher.* There are, it is true, those who argue that the 1922 consumption is not a true one, but is the result of the restocking of invisible supplies which had diminished during the abnormal post-war years, and that therefore 1923 will show a decreased consumption. But there is apparently little or no evidence to support this view, while the contrary is indicated by the fact that the trade distributing channels generally are too well stocked. More probable is it that the Old World is getting out of the restrictive groove in which the war landed it and is seeking a bigger per capita consumption, while the New World, so far as the United States is concerned, has developed a permanently increased demand for sugared drinks to take the place of the prohibited alcoholic beverages.

> *The result is that in 1923 sugar consumption will have overtaken and passed production.* The producer will hence be in receipt of a much more remunerative price for his sugar, which will *inter alia* give him the means to enlarge his output, either by laying down more efficient machinery or else by increasing his cane crops and milling a large output of cane. (R. p. 96.)

Therefore, as far back as December, 1922, the trade generally was thoroughly familiar with the expectation that consumption of sugar would very substantially exceed production.

Another significant fact is thus incidentally stated by Mr. Gilmour:

> To state that these "future" operations were simply a matter of paper speculation is entirely to try to cloud the question, for the largest sellers at all times were those who represented actual producers, or those who had bought actual sugar for arrival in the United States at a future date and sold "futures" on the Exchange as a hedge. (R. p. 97.)

This conclusively shows that both the producers and the purchasers of sugar and their representatives were all the time satisfied with the prevailing prices, and knew of no reason justifying an advance, or they would not have been hedging to secure the existing price.

Therefore the establishment of the claim that the report of the Department of Commerce was the cause of the advances in sugar prices would be a

condemnation of the Sugar Exchange. If the report imparted information with which the members of the Exchange were not familiar, the claim that the Exchange performs a useful function in securing advance reliable information with reference to the conditions of sugar crops is conclusively refuted. There was nothing in the report which was not known to or could not have been easily ascertained by any member of the Exchange. If it was the *form* and not the *substance* of the report that caused the orgy of trading and the consequent advances in prices, the Exchange certainly has no proper place in the economic life of the country. It may be that the report was "an *adequate* cause for the abrupt and sudden rise in prices," considering the organization of and the operations on the Exchange and its influence upon prices, but it certainly was not a *sufficient* cause to have produced the least disturbance in the market *in the absence of a piece of machinery of the nature of the Exchange*. Moreover, if the headlines and introduction of the report were seized upon by the owners of large quantities of raw sugar or by speculators as an excuse for and a means of producing a panic on the Exchange resulting in the abrupt and sudden rise in prices, the existence of an instrumentality that can be, and is, so manipulated is a menace to the public welfare and violative of the Anti-Trust Act, and it should be suppressed.

Estimates of the Cuban crop made some time subsequent to the sudden and abnormal advance in

February are cited as a justification of the high price of sugar. For instance, in the petition it is alleged that "the estimates of four recognized authorities of the crop for 1922–1923 are as follows: Guma-Mejer (Cuba), 3,800,000; Willett & Gray (U. S.), 4,000,000; Department of Commerce (U. S.), 4,000,000; H. A. Himely (Cuba), 4,102,857. (R. pp. 18, 19.) In the answer it is admitted—

> that the estimates of four of the recognized authorities, to wit, Guma-Mejer, Willett & Gray, Department of Commerce, and H. A. Himely, on the crop for 1922–1923 were, as of the date when they were made, as stated in complainant's bill, but they allege that since the date of said estimates two of said recognized authorities have revised and reduced their estimates, and that Guma-Mejer on April 25th, 1923, further reduced his estimate from 3,800,000 tons to 3,670,000 tons, and that H. A. Himely, on April 20, 1923, reduced his estimate from 4,102,857 tons to 3,735,000, or approximately a quarter of a million tons. (R. p. 53.)

However, *these revised estimates could have had nothing whatever to do with the agitation on the Exchange and sudden skyrocketing of prices from February 9 to 14.* They are cited, and were probably made to serve, as an excuse for keeping up the prices and as justifying advances up to the filing of the petition.

DAILY FLUCTUATION OF PRICES.

That the general condition of the sugar industry and the existing or prospective relationship between

supply and demand were not responsible for the prices of sugar as published from day to day, but that they were the result of manipulations and speculations on the Exchange, is conclusively shown by a study of the daily change in prices. The petition contains a table showing the "Closing prices on New York Coffee and Sugar Exchange for each trading day from February 1, 1923, to April 16, 1923." (R. p. 20.) With reference to this table it is said in the answer:

> * * * these defendants admit that the table therein contained showing the closing prices on the New York Coffee and Sugar Exchange for each trading day from February 1, 1923, to April 16, 1923, is substantially correct, and they allege that said trading for the most part was subsequent to the said publication by the United States Department of Commerce. (R. p. 55.)

This table is here reproduced, adding just before the price each day for each delivery month the amount of advance or decline from the previous day's price. The plus sign indicates an advance from the previous day and the minus sign a decline.

Closing prices on New York Coffee and Sugar Exchange for each trading day from February 1, 1923, to April 16, 1923.

	March delivery.		May delivery.		July delivery.		September delivery.	
Feb. 1......		$3.56		$3.65		$3.76		$3.84
2......	+$0.13	3.69	+$0.12	3.77	+$0.12	3.88	+$0.12	3.96
3......	− .02	3.67	− .02	3.75	− .02	3.86	− .03	3.93
5......	− .05	3.62	− .04	3.71	− .04	3.82	− .04	3.89
6......	+ .24	3.86	+ .16	3.87	+ .17	3.[illegible]	+ .18	4.07
7......	+ .10	3.96	+ .08	3.95	+ .06	4.05	+ .04	4.11
8......	+ .11	4.07	+ .12	4.07	+ .12	4.17	+ .12	4.23

Closing prices on New York Coffee and Sugar Exchange for each trading day from February 1, 1923, to April 16, 1923—Continued.

	March delivery.		May delivery.		July delivery.		September delivery.	
Feb. 9	+$0.21	$4.28	+$0.25	$4.32	+$0.25	$4.42	+$0.23	$4.46
10	+ .15	4.43	+ .29	4.61	+ .40	4.82	+ .45	4.91
13	+ 1.00	5.43	+ 1.00	5.61	+ 1.00	5.82	+ 1.00	5.91
14	− .18	5.25	− .21	5.40	− .42	5.40	− .41	5.50
15	− .36	4.89	− .38	5.02	− .22	5.18	− .22	5.28
16	+ .18	5.07	+ .20	5.22	+ .17	5.35	+ .21	5.49
17	+ .21	5.28	+ .23	5.45	+ .23	5.58	+ .23	5.72
19	− .15	5.13	− .14	5.31	− .14	5.44	− .15	5.57
20	+ .07	5.20	+ .06	5.37	+ .06	5.50	+ .07	5.64
21	+ .26	5.46	+ .28	5.65	+ .27	5.77	+ .23	5.87
23	+ .08	5.54	+ .08	5.73	+ .06	5.83	+ .07	5.94
24	− .22	5.32	− .22	5.51	− .24	5.59	− .24	5.70
26	− .22	5.10	− .28	5.23	− .27	5.32	− .29	5.41
27	− .02	5.08	− .04	5.19	− .07	5.25	− .07	5.34
28	+ .40	5.48	+ .34	5.53	+ .37	5.62	+ .37	5.71
Mar. 1			+ .12	5.65	+ .12	5.74	+ .11	5.82
2			− .07	5.58	− .09	5.65	− .08	5.74
3			− .17	5.41	− .17	5.48	− .17	5.57
5			+ .06	5.47	+ .07	5.55	+ .05	5.62
6			+ .10	5.57	+ .11	5.66	+ .14	5.76
7			+ .01	5.58	− .02	5.64	− .03	5.73
8			+ .17	5.75	+ .20	5.84	+ .22	5.95
9			− .09	5.66	− .08	5.76	− .08	5.87
10			+ .03	5.69	+ .04	5.80	+ .03	5.90
12			+ .17	5.86	+ .19	5.99	+ .19	6.09
13			− .10	5.76	− .10	5.89	− .09	6.00
14			+ .02	5.78	+ .03	5.92	+ .03	6.03
15			+ .01	5.79	− .01	5.91	+ .01	6.04
16			− .05	5.74	− .04	5.87	− .04	6.00
17			+ .02	5.76	+ .05	5.92	+ .05	6.05
19			− .03	5.73	− .02	5.90	− .01	6.04
20			− .14	5.59	− .13	5.77	− .12	5.92
21			− .09	5.50	− .08	5.69	− .08	5.84
22			+ .18	5.68	+ .19	5.88	+ .20	6.04
23			− .13	5.55	− .13	5.75	− .14	5.90
24			− .11	5.44	− .09	5.66	− .10	5.80
26			+ .08	5.52	+ .07	5.73	+ .07	5.87
27			+ .14	5.66	+ .15	5.88	+ .18	6.05
28			− .03	5.63	− .05	5.83	− .06	5.99
29			− .01	5.62	− .01	5.82	− .02	5.97
Apr. 2			− .05	5.57	− .05	5.77	− .05	5.92
3			+ .01	5.58	+ .01	5.78	+ .01	5.93
4			+ .04	5.62	+ .04	5.82	+ .04	5.97
5			+ .13	5.75	+ .14	5.96	+ .14	6.11
6			+ .01	5.76	+ .01	5.97	+ .02	6.13
7			.00	5.76	.00	5.97	− .02	6.11
9			+ .12	5.88	+ .14	6.11	+ .17	6.28
10			+ .03	5.91	+ .03	6.14	+ .01	6.29
11			+ .01	5.92	+ .01	6.15	+ .01	6.30
12			− .06	5.86	− .09	6.06	− .10	6.20
13			.00	5.86	.00	6.06	+ .01	6.21
14			+ .01	5.87	.00	6.06	.00	6.21
16			+ .10	5.97	+ .11	6.17	+ .10	6.31

Mr. Dierck's statement contains a table showing the prices of spot sugar each day from February 1 to April 21. That table is here reproduced, and there is added or subtracted the amount that would equalize the price with the price the same day for the nearest futures up to April 16, the last date given in the table appearing in the petition. For illustration, on February 1 the price for spot sugar was $3.52, which plus 4 cents equals $3.56, the price of March futures; on February 3 the price for spot was $3.77, which minus 10 cents equals $3.67, the price of March futures. After February the nearest futures were for May.

1923.		
February	1	$3. 52+4
"	2	3. 04+5
"	3	3. 77−10
"	5	3. 71−9
"	6	3. 77+9
"	7	3. 89+7
"	8	4. 01+6
"	9	4. 21+7
"	10	4. 27+16
"	13	5. 26+17
"	14	5. 02+23
"	15	4. 77+12
"	16	5. 02+5
"	17	5. 07+21
"	19	5. 27−4
"	20	5. 14+6
"	21	5. 27+15
"	23	5. 52+2
"	24	5. 52−20
"	26	5. 38−28
"	27	5. 52−44
"	28	5. 52−4
March	1	5. 64+1
"	2	5. 44+4
"	3	5. 52−11
"	5	5. 26+21
"	6	5. 38+10
1923.		
March	7	$5. 40+18
"	8	5. 56+9
"	9	5. 58+8
"	10	5. 52+17
"	12	5. 64+22
"	13	5. 64+12
"	14	5. 64+13
"	15	5. 64+15
"	16	5. 64+10
"	17	5. 64+12
"	19	5. 52+21
"	20	5. 64−5
"	21	5. 44+6
"	22	5. 52+16
"	23	5. 52+3
"	24	5. 52−8
"	26	5. 38+14
"	27	5. 52+14
"	28	5. 52+11
"	29	5. 52+10
April	1	....
"	2	5. 58−1
"	3	5. 52+6
"	4	5. 52+10
"	5	5. 04+11
"	6	5. 64+12
"	7	5. 72+4

1923.		1923.	
April 9	$5.76+12	April 16	$5.89+8
" 10	6.89+2	" 17	6.02
" 11	5.89+3	" 18	6.27
" 12	5.89−3	" 19	6.28
" 13	5.89−3	" 20	6.14
" 14	5.58+29	" 21	6.27

(R. p. 76.)

There are two striking features shown by these tables:

First, the daily variation of the prices; and, second, that there was not a uniform advance, but at times a marked decline. The line of prices is as variable as the tracing of a seismograph recording the tremors of an earthquake.

The pressure from supply and demand is constant, or swings slowly from one side to the other. The supply of an article does not become exhausted or materially depleted within a day or a week unless it is limited in quantity and confined to one locality and is subjected to the ravages of fire, flood, or other destructive agency. And it is wholly abnormal for a demand for an article to be greatly increased overnight. *Certainly there was nothing unusual happening to the sugar crops, or the supply of sugar on hand between February 1 and February 14, or more particularly between February 10 and 13. Nor, so far as the record discloses, had there been one pound added to the rate of consumption or to the demand for sugar. Between February 10th and 13th, who had tried to purchase a pound of sugar and could not get it? Who had ordered spot sugar, or made an order for March, May, July, or September delivery and had been met*

with the suggestion that there would be the least difficulty in procuring it? Who had intimated that there would come a time when a single spoonful of sugar for use in coffee would have to be conserved? And yet over Sunday and a holiday raw sugar for each delivery month had advanced a dollar on the hundred pounds.

But if some reason existed for the $1.00 per hundred advance of futures from February 10 to 13, what reason was there that on the 14th spot sugar should **decline** *twenty-four cents, and futures should* **decline** *eighteen cents for March, twenty-one cents for May, forty-two cents for July, and forty-one cents for September; and that on the 15th spot should further decline twenty-five cents; and March futures decline thirty-six cents; May, thirty-eight cents; July, twenty-two cents; and September, twenty-two cents, making a total decline in two days of forty-nine cents for spot; sixty-four cents for March; fifty-nine cents for May: sixty-four cents for July; and sixty-three cents for September; and that thereafter for two days they should again* **advance** *spot, twenty-five and five cents, respectively; for March delivery, eighteen and twenty-one cents; for May delivery, twenty and twenty-three cents; for July, seventeen and twenty-three cents; and for September, twenty-one and twenty-three cents; and that on the following trading day, the 19th, spot should further advance twenty cents, while futures declined: March deliveries fifteen cents; May, fourteen cents; July, fourteen cents; and September, fifteen cents. Were crops being planted and destroyed, or droughts and rains following each other in such rapid succession?*

Every intelligent person knows that the law of supply and demand did not produce these fluctuations in prices. There is not a word of testimony in the record that suggests that these sudden and continuous fluctuations were due to anything else than the unnatural conditions surrounding the sugar traffic. And as the prices were made upon the Exchange, it alone must be held accountable for them. Nor does it require, to locate the exact cause, any extended research into the affairs of the Exchange. *It is sufficient to know that during every trading day hundreds of transactions were made, averaging during the month of February 1,335 per day, and that more than 99½ per cent of all these transactions were settled through the Clearing House by rings and matching; and that those engaged in these transactions never had any intention to deliver or receive actual sugar, but were only concerned in so manipulating the prices as to realize a profit from the margins arising from the advance or decline during the day.*

OTHER EVIDENCE SHOWING THAT PRICES WERE DUE TO SPECULATION ON THE EXCHANGE.

Other evidence showing that the high prices of sugar were due to speculations upon the Exchange and not to actual conditions existing in the sugar industry is as follows:

Wm. W. Gardiner, as heretofore stated, is one of the editors of the Weekly Statistical Sugar Trade Journal, a journal published by Willett & Gray and quoted from more than any other authority in

giving statistics and general information relative to the sugar industry. This witness says:

> * * * that beginning about February first, 1923, the transactions in the purchase and sale of contracts for future delivery of raw sugar greatly increased on the floor of the said Exchange, and the speculation in such contracts became very great and the prices made and quoted on the floor of said Exchange for such contracts were greatly enhanced, and at the same time the prices obtaining in actual transactions in the purchase and sale of raw and refined sugar were correspondingly enhanced, although as of that time there was no existing shortage of supply of either raw or refined sugar available for use on the markets of the United States; that the prices since that time established both on the floor of the Exchange and in the actual transactions in the sale and purchase of raw sugar have been largely the immediate and direct result of the tremendous speculative operations taking place on the floor of the said Exchange.
>
> Deponent further States that, based upon accurate information as to the present available supplies of raw sugar both on the Island of Cuba and in the United States, there is no existing shortage of raw sugar for sale on the markets of the United States, nor is there any existing shortage of refined sugar for sale on such markets, nor is there any reasonable expectation in the near future of any shortage of the supply of raw sugar available

> for sale in actual transactions taking place on the markets of the United States. (R. pp. 163–4.)

Walter Lewis, an accountant in the employ of the Government, says that the Weekly Statistical Sugar Trade Journal shows an available stock of raw sugar on hand in the United States and Cuba as follows: February 8, 1923, 541,057 tons; March 8, 872,371 tons; April 12, 1,326,911 tons. (R. p. 166.)

William A. Jamison, a member of the firm of Arbuckle Bros.; Earl D. Babst, president of the American Sugar Refining Company; James H. Post, president of the National Sugar Refining Company; Frank C. Lowry, a member of the firm of R. Atkins & Company; and Pierre J. Smith, president of the Federal Sugar Refining Company, each states that during the current calendar year his concern has been able to purchase all the raw sugar required in the conduct of its business, provided it paid the price demanded. (R. pp. 121, 123, 126, 125, 120.)

Jacques R. Haas, vice president of Loft (Inc.), manufacturers of candy; Arthur C. Hoffman, vice president of the Great Atlantic & Pacific Tea Company, owners of 7,500 branch houses in 2,187 cities in 30 States, and engaged in the distribution of sugar, coffee, tea, etc.; John A. Badenoch, vice president of Park & Tilford, a corporation engaged in the manufacture of candy, each says that his concern has experienced no difficulty in purchasing all of the refined sugar required in the conduct of its

business, provided it paid the price demanded. (R. pp. 128, 130, 131).

David A. L'Esperance, Special Assistant to the Attorney General, says—

> that on April 19, 1923, within thirty minutes after the filing of the petition in this cause by the United States, a member of the defendant, New York Coffee and Sugar Exchange (Inc.), called the deponent over the telephone at his office in the Old Post Office Building and stated as follows: "News has just come in over the ticker from Washington that the Government has filed a bill against the Exchange. Is that true? *Hell is being raised down here and a near panic is on on the floor of the Exchange. Margins are being called. The market has dropped off seventy-five points from the opening.* (R. p. 169.)

Mr. George W. Lawrence, witness for the defendant, says that he is the member of the Exchange to whom Mr. L'Esperance referred; and that, while he does not recall the exact language he used, the substance of what he said is correctly stated by Mr. L'Esperance. He doesn't deny that there had in fact happened on the Exchange what he had stated to Mr. L'Esperance; but as an excuse for the heated condition picturesquely described over the phone he says:

> At the time of said conversation, neither the Exchange nor the Clearing Association, nor any member of either exchange, had, so far as I know, been served with a copy of the Bill, and there was a complete ignorance on my part, and, as I believe, on the part of all the

> members of both the Exchange and the Clearing Association, of the contents of the Bill. I had called the counsel for the Exchange, Mr. Wm. Mason Smith, over the telephone and been advised by him that he had not seen a copy of the Bill and did not know its contents, and that his request to Mr. L'Esperance for a copy of the Bill had been refused on the ground that the Government was short of copies. It was, as I verily believe, more than two hours after the news was reported on the ticker before either the Exchange or the Clearing Association or any member of either was able to obtain or see a copy of the Bill. The natural consequence of such tactics on the part of the Government was the great disturbance in trading on the Exchange which resulted. In the absence of other information than the information given out by the Government in Washington and reported over the ticker, it was natural that those holding open contracts on the Exchange should desire to close them out, with the resulting decline of 75 points in the market from the opening. (R. pp. 87–88.)

The Government of course had no thought of making an experiment, but a clearer demonstration of the absurdity of the claim that the supply of and demand for sugar regulates prices on the Exchange could not have been made. On this occasion the prices dropped seventy-five points in thirty minutes, just because the *Exchange was attacked by the Government*, which could have nothing to do with the

condition of the sugar crops, or the demand for sugar by the public.

Attention is called to the report of the Special Commission on the Necessaries of Life of the Commonwealth of Massachusetts, made in response to a special act of the legislature directing it to investigate and report upon the sugar prices. Mr. Hultman, the chairman, who shows that he is eminently qualified for the important position which he occupied, states that their commission had a hearing, and had before them those whose business required them to be thoroughly familiar with the sugar industry in that section of the United States; and he gives the names of a number of gentlemen who appeared. (R. p. 132.) In addition to the hearing they sent out 1,000 questionnaires, and received 800 replies from manufacturers of candy, ice cream, sirup, and jam, and wholesale and retail grocers, packers, and others; and upon the information thus obtained the commission prepared and filed a report, which is exhibited with Mr. Hultman's statement; and in that report they expressed the opinion:

> The recent rapid rise in the price of sugar was apparently caused by an adroit manipulation of the economic law of supply and demand. On the rising market many dealers in and users of sugar were stampeded into buying for speculative or hoarding purposes.
>
> * * * * *
>
> During the recent abnormal demand for refined sugar dealers experienced no difficulty

in obtaining delivery of sugar from the refiners to meet their requirements.

Much of the sugar purchased in the last three months, when the sugar shortage propaganda was being widely circulated, was apparently bought for speculative purposes and future use. This will, of course, tend to lessen the demand for sugar next summer and fall. The price of sugar, which is more than 50 per cent above the price last year, should restrict the demand for and use of it.

The commission finds that the increase in the tariff on sugar last September of less than one-fifth of a cent per pound can not be a material factor in increasing the price of sugar more than 3 cents per pound.

The sale of a product in such a way as to secure the most for it is the primary problem of producers. The Cubans and those holding their financial obligations are now trying to recoup their losses resulting from the collapse and bankruptcy that followed the 1920 orgy of speculation in sugar.

In 1922 approximately 6,000,000 tons of sugar, which is more than the entire consumption of the United States, were traded in on the New York Coffee and Sugar Exchange, but only 55,000 tons (less than 1 per cent of the volume of trading) were actually delivered through the channels of the Exchange. Under the rules of the Exchange the seller of "futures" may buy back his Exchange contract; the buyer may also sell his "futures" contract. This results in swapping of con-

tracts rather than in legitimate dealing in sugar.

The commission is of the opinion that the dealings on the New York Sugar Exchange played an important part in the recent thimblerigging of sugar prices. (Pages 14–16 of Report.)

* * * * *

On the hearing before the Massachusetts Commission there was filed with the commission a statement by Wm. Van V. Warren, New England manager of the American Sugar Refining Company, which is exhibited with the commission's report. The important parts of Mr. Warren's statement read as follows:

> As distinguished from the purchase and sale of raw sugar for actual delivery to the refiners, there is a speculative buying and selling of raw sugar futures on the New York Sugar and Coffee Exchange. Our company is not a member of this Exchange and does not operate thereon, and so far as I am advised the same situation is true of other refiners. The dealings on that Exchange are by operators and speculators. It is no doubt a fact that the prices fixed by these corporations, to a considerable degree, control the price at which actual raw sugar is offered to the refiners in New York.
>
> The CHAIRMAN. What do you mean by operators—speculative operators?
>
> Mr. WARREN. Speculative operators.
>
> The CHAIRMAN. Speculative operators and other speculators practically control the New York market?

Mr. Warren. Coming now to [illegible] discussion of the unsettled condition that has existed in the sugar market for the last six weeks. I will not burden you with a statement of the conditions leading up to the sugar crisis of 1920 and the trend of the market since that time. However, the reverses of 1920, the elimination of rationing regulations in foreign countries, and the readjustment of the world's markets, have all had their effect on the world's sugar situation, and indirectly an effect on the situation in this country. The first serious disturbance in the industry of the United States this year was early in February, when "sugar shortage" stories were broadly circulated as the result of an unfortunate heading on an advance report of the world's sugar position, issued by the Department of Commerce. At about the same time the Cuban crop estimate of 1923 was substantially reduced by a recognized authority. These two factors brought about unprecedented speculation on the Sugar Exchange and hysteria in the trade, both of which have had the effect of maintaining an unsettled condition until the present time. The facts surrounding the beginning of this disturbance are as follows:

On February 9th the Department of Commerce released, for use not earlier than February 12th, a summary of an article on Sugar Production and Consumption, to be published in the Commerce Reports issued February 12,

1923. The advance release contained the following headlines:

"TREND OF WORLD SUGAR PRODUCTION AND CONSUMPTION.—PRODUCTION FOR *1923* ONLY 125,000 TONS HIGHER THAN LAST YEAR.—CONSUMPTION NEEDS ESTIMATED AT 725,000 TONS ABOVE PRODUCTION."

This story was featured in the press in sensational headlines as early as the morning of February 10th. * * *

While the report of the Department contained the headlines above quoted, it should be said that a careful analysis of it would have disclosed that instead of predicting a sugar shortage it, in fact, showed that there would be a surplus at the end of 1923, if the supply of sugar carried over from last year was taken into consideration. In other words, the body of the statement showed that the carry-over at the end of 1922 was approximately 1,200,000 tons, and that if the world's consumption in excess of production for 1923, which was estimated to be 725,000 tons, was deducted from the carry over from 1922, there would be a surplus at the end of 1923 of approximately 476,000 tons. This part of the statement was later called to the attention of the public, both by Secretary Hoover and other representatives of the Department. However, the headlines of the Department's advance notice had been so featured and given such wide publicity that the subsequent announcements had but little effect in quieting the highly excited sugar market.

Just about the same time, on February 12th, Guma-Mejer, the generally accepted authorities on Cuban production, reduced their former estimate of the 1923 Cuban crop by approximately 400,000 tons. Their estimate of the 1923 Cuban crop, on December 18, 1922, was 4,193,500 tons. The revised estimate of February 12th placed the crop at 3,800,000 tons.

The public had the opportunity, over the week end of February 10th and the holiday of February 12th, to digest both of these alarming reports. On February 13th the raw-sugar market reflected advances unknown in the trade since 1920, and enabled speculative interests to advance prices in the maximum amount permitted in one day on the New York Sugar Exchange. I do not think that I could better describe the situation existing at that time than to quote the Daily Sugar Trade Journal of Willett & Gray of February 13, 1923.

"A widely speculative and very dangerous market has appeared in raw sugars. At the opening of the Sugar Exchange to-day sugar options were up 1 cent a pound and this brought options on the Exchange up to the Exchange rule of allowing only a fluctuation of 1 cent a pound during a day. This speculative movement commenced on Saturday, the option market on that date being up from 20 to 40 points, making a total advance in options since Friday night of about 1.60 cents a pound. This naturally excited the actual raw-sugar market and speculators were able to bid correspondingly high prices for actual Cubas,

against which they sell options on the Exchange, which resulted in sales to-day of Cubas at $5\frac{1}{8}$ cents c. & f. equal to 6.91 cents duty paid, $5\frac{3}{8}$ cents c. & f. (7.16 cents), $5\frac{7}{16}$ cents c. & f. (7.44 cents), and about 6,000 tons of San Domingoes, Peruvian, Haytian, etc., sugars at 5 cents and $5\frac{1}{8}$ cents c. i. f. New York, but with operators now bidding $5\frac{3}{4}$ cents c. & f. without obtaining Cuban sugars. This is an advance of 1 cent a pound over sales made on Saturday to speculators of Cubas at $4\frac{7}{16}$ cents c. & f. for Cubas. The advance is directly attributable to the misleading statement issued by the U. S. Department of Commerce, indicating a decided scarcity of sugar throughout the world and which was followed this morning by a reduction in the Cuban crop estimates by Messrs. Duma-Mejer, of Havana, to 3,800,000 tons."

Willett & Gray weekly of February 15, 1923, stated:

"Refiners took the only course possible with the wildly speculative raw market and all withdrew as sellers of refined sugar during the wild advance in raws, leaving the quotation nominal at 7.25 cents less 2 per cent."

In the weekly issue of February 21, 1923, Willett & Gray said:

"The market during the week has been entirely under the influence of speculation, refiners participating in the purchasing of raws to only a limited extent and then only replacing with raws the refined sugar which they have sold at present refined prices. Refiners appear to be acting conservatively, undoubt-

edly believing that present prices are unwarranted by actual conditions, although the speculators, particularly that class which has been mislead by the reports of a shortage, have been able to push up options on the Exchange sufficiently high to pay 5¼ cents c. & f. (7.03¢) for Cubas."

On February 9th sales of raw sugar were made at 4 cents and 4⅛ cents c. & f. On February 14th raw sugar was offered at prices as high as 6 cents c. & f. with no buyers. On February 15th there was a temporary reaction and raw sugar was offered at 4¾ cents c. & f. From that date the raw market increased to 5½ cents on February 23rd. There was a slight decline on February 26th and 27th, but from that date the market was strong and the peak price of 5¾ cents was reached on March 12th. Since that time the price of raw sugar has fluctuated between 5½ cents and 5⅝ cents, cost and freight. These increased prices for raw sugar forced the refiners to make corresponding increases in the price of refined sugar. The first increase after the disturbance in the raw-sugar market was on February 15th, when the price was increased from 7.25, the price prevailing on February 9th, to 8.25, although one refiner quoted 8 cents and others named 8.30. On February 23rd the price was increased to 9 cents, on March 2nd it was increased to 9.15, and on March 13 to 9.30 cents. There was little business done at the latter figure, and on March 31st the price was reduced to 9 cents. During all of this period there was some difference in the prices as be-

tween the different refiners. The maximum increase in the price of raw sugar, cost and freight, since February 9th, has been approximately $1\frac{3}{4}$ cents per pound. The price of refined sugar to-day of 9 cents is an increase of $1\frac{3}{4}$ cents per pound over the price in effect on February 9th. (R. 136–139.)

There can not, therefore, remain a shadow of doubt that it was the agitation on the Exchange that produced the sudden and abnormal rise in the prices of sugar, nor can it make any difference what the immediate cause of the agitation was. There would have been no agitation if there had been no Exchange, or if it had been properly and legally organized; and no abnormal rise in prices would have resulted.

Furthermore, it was fully realized when the Exchange was organized that there would come days of wild excitement accompanied with violent advances, declines, or fluctuations in prices. This is shown by the following provisions in Trade Rule 3 (Charter, By-Laws & Rules, p. 74):

> To avoid abnormal fluctuations of price and injurious speculation incident thereto, trades for future delivery in any month, during any one day, shall not be made at prices varying more than two cents per pound for coffee and one cent per pound for sugar above or below the closing bid price of such month of the preceding business session of the Exchange.
>
> Nor shall trades in any month be made in any one day at an advance of more than two cents per pound for coffee and one cent per

pound for sugar above the lowest previous price of such month on that day, or a decline of more than two cents per pound for coffee and one cent per pound for sugar below the highest previous price of such month on that day.

For the purpose of this Rule, the closing bid price shall be not less than the minimum price prescribed therein.

FUNCTIONS OF AN EXCHANGE AND ITS ECONOMIC EFFECT.

Exchanges for dealing in commodities have been bitterly attacked and as earnestly defended, and no doubt some reason exists for both the attack and the defense. If an exchange performs a valuable economic service, to that extent it is not only tolerable but commendable. But, like other organizations, though it performs some valuable functions, it may be so perverted that the evils arising from its activities are greater than its benefits. In such case, if within the jurisdiction of the court, its evil practices should be eliminated and the good be continued, provided the evil and the good can be segregated.

It is useless to produce an article if it never reaches a consumer. Between its production and its consumption it may be necessary that it be subjected to one or more processes of preparation, as the conversion of wheat into flour and subsequently the flour into bread. Each party performing a process of manufacture may for the time be the owner of the commodity. Two things are necessarily incident to these changes of ownership and the ultimate con-

sumption of the commodity. One is its transportation, and the other is the agency through or by which its ownership passes from one person to another. *The sole legitimate object of an exchange is to facilitate this change of ownership.*

An exchange is supposed to be composed of a large number of those who are engaged in the same business; that is, are engaged in buying and selling the same commodity. If it is an effective exchange the trade thereon must be so extensive as to control the market price of the commodity. In fact an exchange must control the price, or it would be deserted by its members. For reasons heretofore stated, we will use for illustration commerce in wheat with the supposition that the wheat exchange is organized as the sugar exchange is proven in this case to be organized. In so far as the exchange facilitates the transfer of wheat from the farmer to the miller to that extent it is an economic factor for good. It can readily be understood how an organization composed of those engaged in buying and selling wheat might serve as a convenience for both farmers and millers. If it were only a place for the buyers and sellers, or those acting as *bona fide* agents of those having wheat to sell and actual buyers of wheat, to meet and transact their business with each other, it would certainly facilitate the exchange of that commodity. Instead of one who desires to make a sale for himself or as agent being compelled to hunt through the offices of several brokers for a purchaser he can step into the exchange and make an offer to

all at once; or, if one wants to buy he can step into the exchange and readily find a seller. Nor can any legitimate criticism arise from the fact that the wheat is sold or bought for future delivery. The farmer generally sells immediately after his crop is threshed; but the buyer expects to carry it for a time, knowing that the miller will want to buy in such quantities, and for delivery at such times, as will keep his mill running and will supply his customers. Up to this point it can be easily understood that an exchange serves a useful purpose in that it facilitates the making of *bona fide* sales and purchases of wheat for immediate or future delivery.

But as the middlemen's business is speculative in its nature the spirit of speculation becomes more pronounced, and a system of selling and buying "futures" is devised. While a "future" is nominally a contract for wheat to be delivered in the future, yet it must be carefully distinguished from a real purchase of wheat for future delivery. In the mind of the traders it is a something separate and apart from the wheat. In fact it is the difference in the price of wheat when the trade is made and the price when canceled. And each knows that the cancellation will take place at the close of the day's business, and each guesses that it will be a profit to him but knows that it may be a loss. In such a transaction both buyer and seller know that they are not *trading in wheat*, but are *gambling in margins*. Neither puts up money or security for the price of the wheat, but is required to cover the *margin*.

These margins represent the rise and fall in the price of real wheat on the market; yet it is not the trading in real wheat that controls the margins, but the trading in the margins that controls the price of wheat. Why this trading in margins? Is it to facilitate the passage of wheat from the producer to the miller? Certainly not. *Nothing is intended to be accomplished beyond mere trading—not in the commodity itself, but in margins.*

There are one or two simple trades for which transactions on the exchange can be easily substituted, but the direct transaction is just as convenient. The first form of hedging above illustrated is one of them. A farmer wants to sell a thousand bushels of wheat to be delivered two months hence, when the existing price for delivery on that date is, say, \$1.50 per bushel. He sells a thousand bushels on the exchange. The price drops to \$1.25; and when the date of delivery approaches he buys a thousand bushels at that price and cancels his contract, making 25 cents profit per bushel. He also sells his wheat at \$1.25, and thus realizes \$1.50. The same result would follow if the price advanced. Of course the commission for the transactions always has to be deducted. But why not sell his wheat on the exchange for *actual delivery*? Because the exchange is organized to facilitate *trading* and not the *handling of wheat.* Its members do not want anything to do with wheat. They just want *to trade.* They tax the passing of wheat through the exchange, and so formulate their rules as to prevent its delivery there. The dealer in real wheat

must trade *outside* the exchange. Its doors are open only to the trader *in margins*, who is more of a gambler than he who bets on a horse race, because the gambler on the race has something more tangible upon which to place his stakes.

As it is conceded that the price of wheat in the market is controlled by the price on the exchange, it is important to determine what effect, if any, this trading in *margins* necessarily has upon exchange prices. In fact, this is the question in the lawsuit. If it has no effect—if the prices remain the same as if fixed by actual sales and purchases of wheat—then nothing can be accomplished by compelling such a modification of the rules of the exchange as to prohibit or restrict operations of this character thereon, and the court is without jurisdiction to do so. But if the price of the commodity which moves in interstate commerce is materially affected by trading in this something which has no physical existence, which is incapable of physical production or consumption, then the statute requires that such interference with interstate commerce be stopped.

An examination of the writings of economists upon the subject of exchanges will show that often the writer does not have clearly in mind the distinction between the two classes of trading, the one which involves a delivery of wheat, or is a substitute for a transaction which terminates in its delivery, and the other trafficking in margins. When such a distinction is drawn the writer, especially if he be a recognized authority, almost invariably condemns the

latter class of trading. They correctly designate the *bona fide* buying and selling of the commodity through the exchange, and some transactions which are substituted for actual sales, as speculation, and then point out how such speculation tends to fix and maintain the true price of the commodity; and all of the forces suggested by them as influencing the true prices on the exchange are those incident to legitimate trading of this character. *But are there not potential forces present in trading in margins which do not exist in bona fide trading in the commodity? And are not those which are present in both kinds of trading exerted in a different manner and to a different degree of intensity?*

If all trading in wheat were directly between the farmer and the miller the price would be controlled entirely by supply and demand. As the miller must buy wheat for future delivery, this would involve anticipated as well as present supply and demand, and future prices would necessarily depend upon conditions determined by the best judgment of those bargaining; but there would be a steady effort upon the part of the farmer to enhance prices and upon the part of the miller to reduce them. But the middleman, who buys from the farmer and sells to the miller, is therefore subjected to contending motives. He wants to buy at a low price, which tends to keep the market low, but to sell at a high price, which tends to advance the market. However, as he sells the same amount he buys, these opposing forces are about equal, and prices would

still depend upon the presnet and anticipated supply and demand. But how is it when there intervenes a large class of traders operating under a plan adopted by an exchange whose sole or principapl business is *to deal in margins;* and whose profits or losses depend upon the advance or decline in the price of wheat upon the exchange for the day? *A very radical difference between such trading and the selling and buying of the commodity is, that the transactions are not limited in number to the actual demands of commerce in wheat.* Millers buy only the quantity they then need or expect to need, and the farmers can sell no more than they possess or the millers will buy. *But the transactions in margins have no limit.* Broker A sells heavily during the day, expecting the price to decline. If it does decline he closes out at a profit, because he sells at a higher price than that recorded at the close of business. Broker B has bought just as heavily and is just as anxious for prices to advance. And it may be urged that as there must be as much buying as selling the efforts on the one side will offset those on the other, which in a measure is true. But there is a struggle for mastery which does not exist in buying wheat from the farmer and passing it on to the miller. Fortunes may be depleted or wiped out. Resort is had to every trick of the trade. It is like a tug of war. If one side be slightly weakened, disaster comes quickly. In the midst of the pull one abandons his fellows and grabs the other end of the rope. The law of fairness has no place

there. It is war, and everything is fair in war. This battle over margins is as far removed from the steady pressure from legitimate trading which gradually lifts and lowers prices as the ordinary breeze is from a storm at sea. The storm is not raging all, or a very great part, of the time, but these extraordinary forces are always present in a greater or less degree, and a storm may break at any time.

Some of these forces are entirely absent from trading in the commodity. It may be whispered around that a prominent speculator is financially embarrassed, or that a strong combination is going to try to run a corner, or that a prominent seller has suddenly become a buyer, or a buyer a seller, or, perchance, that the Government contemplates an attack upon the exchange itself, or even that a representative of the Government has said that no facts have been ascertained to indicate that the exchange is violating the law. Any news of such character agitates the market and immediately sends the prices up or down.

Wheat has been used as an illustration instead of sugar because if an exchange is needed for any commodity it is probably wheat. Wheat is produced by tens of thousands of farmers, and is ground into flour by thousands of millers. Likewise cotton is produced by tens of thousands of cotton growers, and is spun by thousands of mills; while raw sugar is produced by but comparatively few sugar growers, or at least before it is put upon the market it becomes the property of but few persons, and is converted into refined sugar by only ten corporations, who own

sixteen refineries. And all the refined sugar is therefore put upon the market by these sixteen refineries.

Apparently it is a simple problem for raw sugar, which is manufactured in different places during certain periods of the year, to find a purchaser among the sixteen refineries, and a simple problem for these refineries to pass the refined sugar on to the wholesaler; and there can be but little excuse for such a highly organized agency as the Sugar Exchange, through which practically no actual sugar is ever delivered. There was no sugar exchange in existence in this country prior to December, 1914, and its activities were suspended from August, 1917, to February, 1920, and consequently its operation has extended over a period of only five or six years. Therefore it certainly cannot be insisted with reason that its existence is essential to the distribution of sugar in the United States.

VIEWS OF ECONOMISTS.

Mr. Diercks, in his affidavit, contends that the Exchange performs a useful function, and especially cites for his authority "The Principles of Economics," by Professor Edwin R. A. Seligman, LL. D., McVicker, professor of political economy of Columbia University; the report of the Industrial Commission of Congress made in 1901, Vol. VI; and an article entitled "Speculation and Farm Prices," in Cyclopedia of American Agriculture, pages 243–245. Among the authorities upon this subject probably no one stands higher than Professor Seligman. The question of

speculation in the purchase and sale of products is treated by him at considerable length; and but little can be found elsewhere on either side that is not there mentioned, and his dicussion is worthy of the most careful consideration. In defining speculation, Professor Seligman says:

> By speculation is meant the purchase or sale of anything in the hope of profit from an anticipated change in its price. It differs from ordinary trade only in degree, for all profit, as we have seen, has an aleatory element. The difference, however, consists in the fact that speculation concentrates and intensifies the forces which affect demand and supply (p. 359).

He then discusses what he denominates "sporadic" speculation, as follows:

> Speculation, again, may be sporadic or regular. Sporadic speculation is almost as old as business itself. It is the result either of a popular frenzy or of a deliberate scheme to take advantage of a temporary occurrence. An example of the first kind is the tulip mania in seventeenth-century Holland, when the most fabulous profits were made by those who had anticipated the short-lived demand for bulbs. So also the occasional speculative "booms" in real estate at present are the cause of enormous profits, followed by corresponding losses when the bubble is pricked. In such cases speculation is due to changes in demand which it is almost impossible for individuals to foresee or to control. Supply, on

the other hand, lends itself more readily to manipulation, and deliberate attempts are not infrequently made to accomplish this end. From the efforts of Joseph to buy up the corn crop in Egypt, and from the decision of the Greek philosopher to show his practical wisdom by purchasing in advance of the vintage all the wine presses, down to the modern pools and rings, attempts to corner the market are occasionally found. While sometimes successful in minor cases, they commonly fail when on a large scale. The failure is due (a) to the immensity of the capital required, (b) to the difficulty of procuring and retaining trusty confederates whose selfish interests may often be best subserved by selling when their principal is buying, (c) to the fact that rising prices will bring to the market all the reserved stock, and (d) to the danger of the substitution by the consumer of some cheaper commodity. Thus, while the successful corner in Harlem stock in 1863 laid the foundation of the Vanderbilt fortunes, the three most picturesque and gigantic attempts of the last two decades—the Chicago Leiter corner in wheat, the Paris Sécrétan corner in copper, and the New York Sully corner in cotton—have all been failures, resulting in the ruin of the speculators.

Both classes of sporadic speculation are in the end socially disadvantageous, because the speculative price is driven far above or below the true value, with resulting losses in the process of restoring the equilibrium. The inordinately high cotton prices, due to the

speculative attempts of 1904, well-nigh produced a crisis in the cotton industry in England and New England, and while the southern planters temporarily benefited the high profits led to such an increased acreage during the next season that the price fell below the cost of production. A moderately remunerative price would have been preferable to these sudden alternations of large profits and extreme losses (pages 360–361).

He then speaks of another class of speculation, as follows:

> It would, however, be a mistake to assume that all speculation is of this character. Speculation could never have become a part of the normal business life of modern times if it had simply these defects and antisocial characteristics. The modern stock and produce exchanges have a definite economic function to perform (page 361).

And in discussing what he denominates "regular" speculation, he says:

> The chief economic function of regular speculation consists in the assumption of risk and results in the equalization of price.
>
> First, as to the assumption of risk. When, under the stress of modern capitalism, dealings in commodities became national and even international, the perturbations affecting market values grew to be so vast and so numerous that ordinary business was seriously compromised by the violent fluctuations in the price of the raw materials of industry. The manufacturer who bought his materials in the inter-

national market expected indeed a profit on the production of the finished article, but was unwilling to have this profit turned into loss by sudden changes in the price of the raw material. It was to secure an escape from the risks of such oscillations that a special class arose which assumed this risk and by concentrated attention derived a profit from the price fluctuations.

The first way in which risk is minimized for the ordinary business man and assumed by a regular speculative class is through the provision of a continuous open market. A cotton spinner, for instance, accepts an order for goods to be delivered in a year, and expects to begin spinning in six months. Unless he is able to buy now the cotton to be delivered then, he will be at the mercy of the chance variations in the cotton market, and although he may be the most capable of business men his entire profit may be wiped out by a rise in the price of cotton. The cotton future enables him to eliminate this risk. The same is true of futures in wheat or other commodities. It applies equally to the stock exchange. If a railway or other industry, in launching a new enterprise, had to depend on the chance investors at the time of the issue of the securities, it would be seriously hampered. The mere knowledge that at any moment there will be a ready sale on the Exchange greatly increases the circle of purchasers, many of whom may not intend to be permanent investors (pages **363, 364**).

Here the author clearly refers to purchases on the Exchange in which actual deliveries are contemplated. In speaking of hedging, he says:

> A natural and more recent outcome of this attempt to avoid risk is the practice of "hedging" or "covering" transactions. An English miller, for instance, needs wheat in February and buys his supply in California, let us say, at a price of 90 cents a bushel. By the time the wheat reaches his mill and the flour has been finally disposed of, it may be September, and the price of wheat may have fallen to 75 cents, with a corresponding fall in the price of flour. To protect himself against such a loss the miller sells in February at Chicago for September delivery the same quantity of wheat for the same price as that at which he bought, 90 cents. When September arrives, he again enters the Chicago market and makes good his delivery contract by buying the wheat at the market price of 75 cents. His profits in this deal equal his losses in the other, and by this process of "hedging" contracts he eliminates all risk in price fluctuations due to the raw material. He is content to derive his gains from the legitimate profits of his milling business. Through the use of such wheat and cotton futures we thus have the paradoxical result that the business man often resorts to speculation in order to free his business from speculative influences (page 364).

In this instance the Exchange transaction is substituted for an actual purchase of wheat; and the

effect of the trade is that the miller gets his wheat at the price prevailing at the time of delivery.

He then proceeds, in further discussing what he denominates "regular" speculation, as follows:

> The result of regular speculation, again, is to steady prices. If with wheat prices at 80 cents a bushel there is a prospect of a large crop, the intelligent speculator will sell short (a future), say at 70 cents, expecting to buy in at 65 cents. All this selling on the part of the bears, however, tends to reduce present prices and thus to increase consumption, which again tends to keep the future price from falling so low or so suddenly as it would otherwise have done. *Vice versa,* if a crop shortage is in prospect, prices tend to rise, the commodity becomes a "good buy" and the bulls are active. The increased purchases tend to raise present prices and to check consumption, while the owners in a rising market hold on for the prospective profit. This combination of a somewhat smaller demand and a larger supply will prevent such a sharp rise in prices as would ordinarily follow a bad crop. Speculation thus tends to equalize demand and supply, and by concentrating in the present the influences of the future it intensifies the normal factors and minimizes the market fluctuation. Speculation hence exerts a directive influence on price (pages 365, 366).

He then closes the discussion of the subject as follows:

> Speculation is hence so perplexing a phenomenon because of its Januslike aspect.

So far as it has become the regular occupation of a class, differentiated from other business men for this particular purpose, it subserves a useful and in modern times an indispensable function. The expert dealer on the exchanges, who studies and prejudges the market, will in the long run secure profits by reducing risks and steadying prices. In this wider sense speculative profits are earned like other profits. *On the other hand, numbers of individuals without experience or ability are constantly taking "flyers" on the exchanges and gamble in securities or commodities as they would in cards. Speculation here is as demoralizing to earnest effort and thrift as is the lottery. Moreover, even the professional dealer will often indulge in what we have termed sporadic speculation, and by an extensive manipulation of the market bring about the unsteadying of prices usually connected with a "squeeze" or a "corner." Difficult as it is to draw the line in practice, the distinction between economic and uneconomic speculation is faintly recognized in the ordinary attitude toward the bucket shop as compared to the stock exchange. It will be more clearly appreciated in the future when the exchanges themselves exercise a more rigid scrutiny over the actions of their members and when business ethics will be lifted to a higher plane of social responsibility. At present speculation has its economic abuses as well as its economic function* (pages 365, 366).

The distinction between the two classes, the "regular" speculators, those who study conditions

and buy and sell wheat, or whose trades upon the Exchange are substitutes for *bona fide* transactions for wheat, upon the one side, and the "sporadic" speculators, the mere gamblers in margins, upon the other, and the benefits arising from the one class of speculation and the evils from the other can hardly be more clearly drawn than is here done by Professor Seligman.

Nearly all of the article "Speculation and Farm Prices," in Cyclopedia of American Agriculture, pp. 243–245, relates to the class of speculation which Professor Seligman calls "regular." And as no arguments are there advanced different from those stated in "The Principles of Economics" it is not worth while to quote therefrom. But this work was written for farmers; and the author seems to regard favorably everything that has a tendency to increase the price of a commodity while in the farmer's hands. He therefore, unlike all eminent economists, does not condemn even the *cornering* of the market.

In the article referred to in the Report of the Industrial Commission of Congress no consideration is given to the class of speculation denominated by Professor Seligman as "sporadic." The entire discussion, which is exhaustive and able, relates to regular, legitimate speculation, the purchase and sale of commodities for future delivery; and it has no bearing whatever on the question here presented.

Under the heading "Some Evils of Speculation," and specially discussing matching and ring settle-

ments, Dr. Henry Crosby, in his work, "Speculation on the Stock and Produce Exchanges of the United States," says (pages 186–188):

> Another distinction sometimes attempted is that between *bona fide* trading and trading for differences. The latter are supposed to be "illegitimate." It has already been shown that the form of contracts is the same in both cases, and that the settlement by difference is merely a matter of convenience after the contract is made. Almost all Exchange transactions are so settled. The whole account of the function of speculation in the previous chapter refers to speculation for differences. To do away with this is to do away with the speculative market altogether. It is not that these dealings are an adjunct to real speculation; it is not that they influence or, as is sometimes said, that they intensify or magnify prices. They make prices. They are *bona fide* offers to buy or sell, and their original nature is not affected by the manner of their settlement. Furthermore, the methods of insurance used by the dealer and the manufacturer would be utterly impossible without the continuous market and settlement by differences.

The author here refers to settlements involving transactions which are substituted for actual sales. If he does not he refutes his own argument, for he continues thus:

> Are all such difference dealings, however, desirable? Is it desirable that speculation

should be so widespread? Here appears the greatest of speculation, the moral evil of a reckless participation in the market by the outside public. The possibilities of making quick and large gains from fluctuations in prices lead thousands into the speculative market, who have no knowledge as to its condition and no real opinion as to the course of prices. They depend chiefly upon chance for their success. Such speculation is the merest gambling in spirit. *The evil is still further increased by the "margin" system. The speculator need not have capital enough to make his purchase, but only enough to "put up a margin" of five or ten per cent with his broker. Thus with a capital of $10,000 he can buy or sell $100,000 of securities (one thousand shares), and win or lose the amount of fluctuation in the value of the whole one thousand shares. The danger is correspondingly increased, since an unfavorable movement may "wipe out" his margin altogether. In other words, he is playing for higher stakes. Added to the natural tendency to gambling, are all the attractive and alluring circulars and advertisements put out by commission houses which are regardless of how many men they may lead to ruin, so long as commissions are forthcoming. The amateur speculator, moreover, often goes in beyond his means, and resorts to credit to retrieve his position. The money of others is drawn into the reckless trading; embezzlement and ruin too often follow.*

It is unnecessary to dwell here upon the disastrous moral results of such practices. In one

sense the economic and the moral effects can not be separated. Moral evil has its economic result. The fostering of the gambling spirit is always at the expense of industry. The lowering of the moral standard injures all trade relations. The instability of fortunes discourages perseverance and economy. Such indirect economic losses it is hard to estimate. There are, however, direct economic effects of speculation by the outside public of a somewhat different kind. The most apparent of these is the unsteadiness of the market in times of speculative excitement. The larger the number of irresponsible persons involved the more does trading at such times partake of the unreasoning nature of all crowd action. Furthermore, where so many are "margined" to the full extent of their available capital, any sudden movement in price may threaten their solvency and necessitate a rush to cover or to liquidate. Hence prices rise rapidly under the force of enthusiasm and then fall suddenly under the fear of panic.

LEGISLATION RELATING TO EXCHANGES.

Congress has from time to time considered and has had thorough investigation made of commodity exchanges to determine whether or not they do or do not perform a useful service; and its views have found expression in legislation, to which the most careful consideration should be given. This court in *Board of Trade of the City of Chicago* v. *Edwin A. Olson, United States Attorney*, decided April 16, 1923, determined the constitutionality of Chapter 369, 42 Stat. 998, which was an act entitled "An Act for the

prevention and removal of obstructions and burdens upon interstate commerce in grain, by regulating transactions on grain future exchanges, and for other purposes." Special attention is called to some of the provisions of that act as indicating wherein Congress, after the most careful investigation, reached the conclusion that the practices of the Exchange resulted in evil rather than good. In Section 3, after reciting that transactions in grain for future delivery are affected with a national public interest; that they are carried on in large volume by the public generally, and by persons engaged in buying and selling grain and the products thereof in interstate commerce; that the prices involved in such transactions are generally reported throughout the United States, and that they are utilized by those trading in and handling grain as a means of hedging themselves against possible loss through fluctuations in prices, it is declared—

> that the transactions and prices of grain on such boards of trade are susceptible to speculation, manipulation, and control, and sudden or unreasonable fluctuations in the prices thereof frequently occur as a result of such speculation, manipulation, or control, which are detrimental to the producer or the consumer and the persons handling grain and products and by-products thereof in interstate commerce, and that such fluctuations in prices are an obstruction to and a burden upon interstate commerce in grain and the products and by-products thereof and render regulation imperative for the protection of such

> commerce and the national public interest therein. (42 Stat. p. 999.)

And the declared purpose of the act was to prevent a continuation of the evil effects arising from the speculation and manipulation described. Section 4 of the act makes it unlawful for any person to participate in the transmission of an offer to make, or of a confirmation of, any contract or any quotation or report of the price of any contract of sale on or subject to the rules of any board of trade, or to make or execute such contract of sale, which may be used for hedging any transaction in interstate commerce in grain or the products or by-products thereof, or determining the price basis of any such transaction in interstate commerce, or delivering grain sold, shipped, or received in interstate commerce for the fulfilment thereof, except (a) where the seller is the owner of the property covered thereby, or is a grower thereof, or one party is the owner or renter of land on which it is to be grown, or is an association of such owners or growers of grain, or of such owners or renters of land; or (b) where the contract is made by or through a member of a board of trade which has been designated by the Secretary of Agriculture as a "contract market" as provided in the act, and is evidenced by a writing showing the date, the parties to the contract and their addresses, the property covered and its price and the terms of delivery, each board being required to keep its records for a period of three years, or longer if the Secretary of Agriculture shall direct.

With reference to the restrictions which shall be thrown around an exchange which may be designated by the Secretary of Agriculture as a contract market, section 5 provides that, (a) the exchange shall be located at a terminal market where grain is sold in sufficient volume and under such conditions as fairly to reflect the general value of the grain and the differences in value between the grades thereof, and where there is available inspection service approved by the Secretary of Agriculture for the purpose; (b) that provision shall be made for reports to the Secretary of Agriculture showing details of all transactions, and also for the keeping of records by the board showing such details, such records to be in permanent form; (c) that the board shall provide for the prevention of dissemination of false or misleading or knowingly inaccurate reports concerning crop or market information or conditions that affect or tend to affect the price of grain in interstate commerce; (d) that the governing board shall provide "for the prevention of manipulation of prices or the cornering of any grain by the dealers or operators upon such board"; (e) that the governing board shall not exclude from membership any duly authorized representative of any lawfully formed and conducted cooperative association of producers having adequate financial responsibility which is engaged in cash grain business, if such association has complied, and agrees to comply, with such terms and conditions as may be lawfully imposed upon other members; and (f) that the board provide for making effective the final

orders or decisions entered pursuant to section 6 of the act, which relates to orders made pursuant to complaints, etc.

In short, this act provides that there shall be no trading in grain or its products on an exchange except where the seller has an interest in grain in the manner designated, or unless the trade be made upon an exchange which has been designated as a "contract market"; and no exchange can be so designated except upon the conditions set out in the act, among which is the provision that the board of trade shall provide "*for the prevention of manipulation of prices or the cornering of any grain by the dealers or operators upon such board.*"

The declaration by Congress that trading on exchanges is susceptible to speculation, manipulation, and control resulting in sudden or unreasonable fluctuations in prices, which are detrimental to the producers and the consumers and the persons handling grain and its products in interstate commerce, and that such fluctuations constitute an obstruction to and a burden upon interstate commerce in grain and its products; and its requirement that the manipulation of prices shall be prevented before business can be lawfully transacted on a grain exchange, is entitled to the greatest consideration. This declaration was made by Congress after the most thorough investigation. It is alleged in the answer in this case "That the trading in futures in the room of the Exchange and the operations of said Exchange are substantially similar to those of exchanges dealing in

other commodities, such as the Board of Trade of the City of Chicago, dealing in grain; the New York Cotton Exchange, dealing in cotton; the New York Produce Exchange, dealing in grain and other produce, and that all of said exchanges, as well as this defendant, perform a great and important economic function in connection with the distribution of the products in which they deal." (R., pp. 42, 43.) If the organization of this Exchange is the same as that of the Board of Trade of the City of Chicago and it performs the same functions, then trading upon this Exchange is subject to the same manipulation and control resulting in the same fluctuations in prices; and if such conditions were an evil when resulting from the operations of a grain exchange and were a burden upon interstate commerce, they are likewise an evil and a burden upon interstate commerce when resulting from the operation of the defendant Exchange.

The view of Congress as to the evils arising from unrestrained operations upon an exchange is further manifested by the provisions of the act of August 18, 1914, entitled "An Act to tax the privilege of dealing on exchanges, boards of trade, and similar places in contracts of sale of cotton for future delivery, and for other purposes." (38 Stat. ch. 255, pp. 693–698.) Under the authority of *Hill* v. *Wallace*, 259 U. S. 44, this act is probably unconstitutional, inasmuch as it purports to be a taxing act and not an act to regulate interstate commerce, but nevertheless it indicates how Congress regards some practices

who is privy to such contract and brings them together for the purpose of entering into the agreement can not recover for services rendered, or losses incurred in forwarding the transaction. The language of the court has heretofore been quoted at length.

This case, of course, is not relied upon by defendants, but is the foundation for the principles enunciated in some of the cases cited by them.

Bibb v. *Allen*, 149 U. S. 481, was an action brought by a firm of brokers to recover commissions for services rendered and money paid in advance by them at the request of the defendants in selling as their agents cotton for future delivery, according to the rules and regulations of the New York Cotton Exchange. The court held that the employment of a broker to sell property for future delivery implies, not only an undertaking to indemnify him in respect to the execution of his agency, but also a promise by the principal to repay or reimburse him for such losses or expenditures as may become necessary or result from the performance of the agency. The authority of *Irwin* v. *Williar* was fully recognized, but the court said:

> But the facts of this case do not bring the transactions in question within the operation of that principle, for the evidence set out in the bill of exceptions fails to show that either party to the transactions intended the same as wagering or gambling speculations. On the contrary, the undisputed testimony establishes that the sales were not wagers, but that the

cotton was to be actually delivered at the time agreed upon (page 491).

Clews v. *Jamieson*, 182 U. S. 461, is especially relied upon by defendants. That was an action to recover damages alleged to have been sustained by the plaintiffs from violation of a contract to purchase and pay for certain stock sold by plaintiffs on the Chicago Stock Exchange.

The court quoted at length from *Irwin* v. *Williar* and other authorities declaring the same principle, but found that there was nothing in the contract which showed that it was a gaming contract and in violation of the statute of Illinois; and that there was no evidence that it was entered into pursuant to any understanding whatever that it should be fulfilled by payment of the difference between the contract and the market price at the time set for delivery.

In *Bond* v. *Hume*, 243 U. S. 15, the question was whether a contract made between a citizen of the State of New York and a citizen of the State of Texas executed in the State of New York for the sale of cotton for future delivery upon the New York Cotton Exchange, and which was a valid contract in the State of New York, could be enforced in a Federal court in Texas in view of the provisions of the bucket-shop law of that State, the action being brought to recover for breach of such contract. The court found that the New York contract "declared on was not only valid under the law of New York, but was not repugnant to the common or general law, as long

That was an action by the Board of Trade of the City of Chicago to enjoin the Christie Grain and Stock Company from using information which was collected by the board for its own private purposes. The defenses were, (1) that the plaintiff had no such property in the information as to warrant its protection by a writ of injunction; (2) that the Board of Trade was operated in violation of the bucket-shop statute of the State of Illinois, and therefore did not come into court with clean hands; and (3) that the transmission of the information was interstate commerce, and a refusal to prevent its use generally was violative of the Anti-Trust Act. There was of course nothing in this last contention, and it was only incidentally mentioned. A number of cases brought by the Board of Trade of precisely the same nature had been previously determined by the lower courts. In 1902 in the case of *Board of Trade* v. *O'Dell Commission Company*, 115 Fed. 574, Judge Thompson, of the Southern District of Ohio, held that the evidence showed that the greater part of the transactions on the Board of Trade were in futures, in which, while in form contracts for the sale and delivery of commodities in the future, it was not contemplated by either party that the commodities would be actually delivered or paid for, but that the deal would be closed by the payment of differences in some form of settlement, and that such transactions were in violation of the laws of Illinois and illegal under the statute of Ohio; and he therefore denied an application for preliminary injunction.

In *Board of Trade* v. *Donovan Commission Company*, 121 Fed. 1012, decided in 1903, Judge Adams, of the Eastern District of Missouri, held that where it was proved that over ninety per cent of the transactions executed in the pits of a board of trade were mere gambling transactions which both parties intended to settle by a payment of differences in the subsequent prices of the commodities dealt in before the maturity of the options, quotations so obtained were of no legitimate value as tending to promote the commerce of the country, and dissemination thereof could not be restrained by such a board of trade. This decision appears to have been placed on general principles rather than upon a supposed violation of the Illinois statute.

In *Board of Trade* v. *Kinsey Company*, 130 Fed. 507, the Court of Appeals of the Seventh Circuit held that the fact that contracts for the sale and purchase of commodities for future delivery made on the exchange, lawful in form, are settled daily by the payment of differences or by canceling out and substituting other contracts by what are known as the direct or ring methods of settlement, does not render such contracts illegal as gambling transactions, for, being lawful in form, they are lawful in fact unless it was the intention and understanding of both parties that there should be no delivery, and lawful contracts may be lawfully canceled and settled in advance of the time for performance; that even if a large portion of them were illegal, such fact did not deprive the board of trade of its property right

in the price quotations based on its sales, which are the same for the lawful as for the unlawful transactions; and that the fact that a board of trade permits gambling on an exchange in violation of law does not affect its right to go into a court of equity for the protection of its property right in the market quotations based on the transactions of its exchange, which, as news, are entirely independent of the exchange transactions; and that court therefore granted the injunction prayed for, reversing a contrary judgment by the District Court of Indiana.

The *Christie case*, which was finally determined by this court, originated in the Western District of Missouri, and was decided by Judge Hook, who sustained the complaint and granted a decree for injunction. This decree was based upon the fact that the rules of the board of trade prohibited gambling transactions, and that consequently all sales thereon were presumptively valid, and the burden of proof rested upon one asserting to the contrary; and the fact that gambling transactions may be carried on on the exchange does not establish the claim that the organization was a bucket-shop concern doing business in violation of the law (116 Fed. 944). On appeal, the decree of the court was reversed by the Court of Appeals for the Eighth Circuit, consisting of Circuit Judges Sanborn, Van Devanter, now Mr. Justice Van Devanter, and District Judge Shiras, the court holding unanimously that the board of trade was not entitled to invoke the aid of the court to protect its property in the quotations made on the

transactions of its exchange under proof which showed that at least eighty-five per cent of such transactions were deals in which it was not intended to make a future delivery of the article nominally dealt in, but which were to be settled by the payment of money only according to the fluctuations of the market; and that the permitting of such transactions and the sending out of such quotations were violative of the statutes of the State of Illinois as construed by the supreme court of that State (125 Fed. 161). Because of the conflict in decisions a writ of certiorari was granted by this court, and the decree of the Court of Appeals was reversed, for the reasons fully set forth in the opinion (198 U. S. 236). The court held (1) that under the facts shown in the record it could not be assumed that transactions on the Board of Trade were violative of the Illinois statute, and (2) that even if there were illegal transactions on the exchange the Board of Trade had a property right in the information which should be protected by the court. From this decision Justices Harlan, Brewer, and Day dissented. The correctness of the principles announced by the court in previous cases to the effect that contracts for mere margins are unlawful was recognized, but the court said:

> Purchases made with the understanding that the contract will be settled by paying the difference between the contract and the market price at a certain time, *Embrey* v. *Jemison*, 131 U. S. 336, *Weare Commission Co.* v. *People*, 209 Illinois, 528, stand on differ-

> ent ground from purchases made merely with the expectation that they will be satisfied by set-off. If the latter might fall within the statute of Illinois, we would not be the first to decide that they did when the object was self-protection in business and not merely a speculation entered into for its own sake. It seems to us an extraordinary and unlikely proposition that the dealings which give its character to the great market for future sales in this country are to be regarded as mere wagers or as "pretended" buying or selling, without any intention of receiving and paying for the property bought or of delivering the property sold, within the meaning of the Illinois act. Such a view seems to us hardly consistent with the admitted fact that the quotations of prices from the market are of the utmost importance to the business world, and not least to the farmers; so important indeed, that it is argued here and has been held in Illinois that the quotations are clothed with a public use (page 249).

The court here first draws a distinction between a contract to settle by paying differences *at a specified time* and a contract where *it is merely expected that it will be satisfied by a set-off*, there being no definite understanding to that effect. But in this case it is shown that all the contracts are made for the purpose of hedging or by speculators, and that all are intended to be settled by rings or matching. The evidence shows that the quotations of prices of sugar on the Sugar Exchange are just as important

as it is there stated the quotations were upon the Board of Trade, and it is because of this importance—because they fix absolutely the prices for the world markets—*that they should be free from all improper influences.*

The court speaks favorably of transactions in futures in the following language:

> As has appeared, the plaintiff's chamber of commerce is, in the first place, a great market, where, through its eighteen hundred members, is transacted a large part of the grain and provision business of the world. Of course, in a modern market contracts are not confined to sales for immediate delivery. People will endeavor to forecast the future and to make agreements according to their prophecy. Speculation of this kind by competent men is the self-adjustment of society to the probable. Its value is well known as a means of avoiding or mitigating catastrophes, equalizing prices, and providing for periods of want. It is true that the success of the strong induces imitation by the weak, and that incompetent persons bring themselves to ruin by undertaking to speculate in their turn. But legislatures and courts generally have recognized that the natural evolutions of a complex society are to be touched only with a very cautious hand, and that such coarse attempts at a remedy for the waste incident to every social function as a simple prohibition and laws to stop its being are harmful and vain (page 247).

We presume it is meant by "Speculation of this kind by competent men is the self-adjustment of

society to the probable" that it is legitimate and beneficial to the public interest that men of means and ability, who will prophesy as to the future from a careful study of existing conditions, enter the business of buying and selling commodities for future delivery, for immediately thereafter recognition is expressed of the fact that there is danger of another class, who are mere imitators and who are possessed of the spirit of gambling, engaged in operations upon the exchange, from which evil effects may result.

The statement by the court that legislatures, as well as courts, have been cautious in attempting to remedy such evils is now hardly in accord with the facts, as Congress and state legislatures have time and again enacted legislation for the purpose of protecting the public against the improper operation of exchanges.

Authorities Relied Upon by the Government.

But few authorities will be cited, because it is believed that the principles declared in but few cases are conclusive of the Government's right to the injunction sought in this case. The following propositions cover the Government's contention:

(1) The provisions of the Act of July 2, 1890, known as the Anti-Trust Act, prohibit every kind of combination, and every activity resulting from a combination, which directly or necessarily restrains interstate commerce. *United States* v. *Standard Oil Company*, 221 U. S. 1, 59–62; and many other cases.

(2) It is not necessary that those combining agree, or that the immediate object of the combination is, to directly affect the transporation or price of a commodity moving in interstate commerce. *It is sufficient if the necessary result of the operation of the scheme or plan adopted is to affect the price or the traffic in such commodity.*

This proposition is conclusively settled by this court in the cases of *American Column & Lumber Company* v. *United States*, 257 U. S. 377, known as the *Hardwood* case, and *United States* v. *American Linseed Oil Company,* decided June 4, 1923, known as the *Linseed Oil* case. Each of these cases was an attack upon a plan or system agreed upon by those engaged in the same line of business, there being no direct understanding as to the control of the prices of the commodity, but the prices being necessarily affected by the operation of the plan.

(3) A combination or agreement to so manipulate an exchange as to cause an unnatural fluctuation of the prices of a commodity moving in interstate commerce is violative of the Anti-Trust Act.

This proposition is conclusively settled in *United States* v. *Patten,* 226 U. S. 525. In that case Patten and others were indicted for running a corner on a cotton exchange. The court below had quashed the indictment, but in construing the indictment the court had held in effect that it alleged a conspiracy to run a corner. This court reversed the judgment of the court below, holding that the allegations of the indictment stated a criminal offense. With reference

to the absence of an allegation in the indictment of an intent to obstruct interstate commerce the court said:

> Although ruling that there was no allegation of a specific intent to obstruct interstate trade or commerce and that the raising of prices in markets other than the Cotton Exchange in New York was "in itself no part of the scheme" the court assumed that the conspirators intended "the necessary and unavoidable consequences of their acts," and observed that "prices of cotton are so correlated that it may be said that the direct result of the acts of the conspirators was to be the raising of the price of cotton throughout the country" (page 539).

And with reference to the effect of the running of a corner the court said:

> It well may be that running a corner tends for a time to stimulate competition; but this does not prevent it from being a forbidden restraint, for it also operates to thwart the usual operation of the laws of supply and demand, to withdraw the commodity from the normal current of trade, to enhance the price artificially, to hamper users and consumers in satisfying their needs, and to produce practically the same evils as does the suppression of competition (page 542).

And the court further said:

> Bearing in mind that such was the nature, object, and scope of the conspiracy, we regard it as altogether plain that by its necessary

operation it would directly and materially impede and burden the due course of trade and commerce among the States and therefore inflict upon the public the injuries which the Anti-Trust Act is designed to prevent. See *Swift & Co.* v. *United States*, 196 U. S. 375, 396–400; *Loewe* v. *Lawlor*, 208 U. S. 274; *Standard Oil Co.* v. *United States*, 221 U. S. 1; *United States* v. *American Tobacco Co.*, 221 U. S. 106. And that there is no allegation of a specific intent to restrain such trade or commerce does not make against this conclusion, for, as is shown by prior decisions of this court, the conspirators must be held to have intended the necessary and direct consequences of their acts and can not be heard to say the contrary. In other words, by purposely engaging in a conspiracy which necessarily and directly produces the result which the statute is designed to prevent, they are, in legal contemplation, chargeable with intending that result. *Addyston Pipe & Steel Co.* v. *United States*, 175 U. S. 211, 243; *United States* v. *Reading Co.*, 226 U. S. 324, 370 (page 543).

The gist of the offense charged against Patten was a combination to restrain interstate commerce, and it could make no difference whether the restraint resulted from the running of a corner, or from any other manipulation of the Exchange which would produce an unnatural fluctuation in the price. Generally a greater agitation would result from a corner, but that is a matter only of degree and can not affect the principle.

(4) If gambling in margins upon the Exchange and the course of dealing thereon from time to time results in an unnatural fluctuation in the price of the commodity traded in on the Exchange, it constitutes a restraint upon interstate commerce, and is violative of the Anti-Trust Act.

This proposition, we submit, is conclusively settled by *Board of Trade of Chicago* v. *Olson*, decided April 16, 1923. That case involved the constitutionality of the Act of September 21, 1922, which was enacted to "prevent and remove obstructions and burdens upon interstate commerce in grain by regulating transactions on grain future exchanges." We have heretofore called attention to the fact that Congress found as facts that transactions on such an exchange were susceptible to speculation, manipulation, and control, and that sudden or unreasonable fluctuations in the prices therefrom frequently occur as a result of such speculation, manipulation, or control, which are detrimental to the producer or the consumer and the persons handling the grain and products and by-products thereof in interstate commerce. This court was not bound by this finding of fact by Congress. It has been repeatedly held that in upholding the constitutionality of an act the court must find for itself such a state of facts as will give Congress jurisdiction to pass the act; and that Congress has not the constitutional power to pass any act upon a false assumption of fact. Therefore the court in that case after reviewing fully the facts which Congress had before it, said:

It is clear from the citations, in the statement of the case, of evidence before committees of investigation as to manipulations of the futures market and their effect that we would be unwarranted in rejecting the finding of Congress as unreasonable, and that in our inquiry as to the validity of this legislation we must accept the view that such manipulation does work to the detriment of producers, consumers, shippers, and legitimate dealers in interstate commerce in grain and that it is a real abuse.

But it is contended that it is too remote in its effect on interstate commerce, and that it is not like the direct additions to the cost to the producer of marketing cattle by exorbitant charges and discrimination of commission men and dealers, as in *Stafford* v. *Wallace*. It is said there is no relation between prices on the futures market and in the cash sales. This is hardly consistent with the affidavits the plaintiffs present from the leading economists already referred to, who say that dealing in futures stabilizes cash prices. It is true that the curves of prices in the futures and in the cash sales are not parallel and that sometimes one is higher and sometimes the other. This is to be expected because futures prices are dependent normally on judgment of the parties as to the future, and the cash prices depend on present conditions, but it is very reasonable to suppose that the one influences the other as the time of actual delivery of the futures approaches, when the prospect of heavy actual transactions

at a certain fixed price must have a direct effect upon the cash prices in unfettered sales. The effect of such a "deal" as that of May, 1922, as explained by Mr. J. H. Barnes, shows this clearly and illustrates in a striking way the direct effect of such manipulation in disturbing the actual normal flow of grain in interstate commerce most injuriously. Mr. Barnes also points out the effect of the operation of the rule limiting deliveries to warehouse receipts from warehouses selected by the directors of the Board whose unregulated power to suspend or modify the rule pending settlement adds to the speculative character of the market and frightens consignors.

More than this prices of grain futures are those upon which an owner and intending seller of cash grain is influenced to sell or not to sell as they offer a good opportunity to him to hedge comfortably against future fluctuations. *Manipulations of grain futures for speculative profit, though not carried to the extent of a corner or complete monopoly, exert a vicious influence and produce abnormal and disturbing temporary fluctuations of prices that are not responsive to actual supply and demand and discourage not only this justifiable hedging but disturb the normal flow of actual consignments. A futures market lends itself to such manipulation much more readily than a cash market.*

In the case of *United States* v. *Patten*, 226 U. S. 525, an indictment charged a conspiracy to run a corner by making purchases of quantities of cotton for future delivery, by means of

which the conspirators were to secure control of the available supply of cotton in the country and enhance the price of cotton at will. It was contended that even if the necessary result of this was an obstruction of interstate trade, it was so indirect as not to constitute a restraint of it within the Federal Anti-Trust Law under which the indictment was drawn. This Court held otherwise and sustained the indictment.

Corners in grain through trading in futures have not been so frequent as they were before 1900, due, as the plaintiffs aver, to the stricter rules of the Board of Trade as to futures and to the Sherman Antitrust Act, though they do seem to have since occurred infrequently. The fact that a corner in grain is brought about by trading in futures shows the direct relation between cash prices and actual commerce on the one hand, and dealing in futures on the other, because a corner is not a monopoly of contracts only, it is a monopoly of the actual supply of grain in commerce. It was this direct relation that led to the decision in the *Patten* case. *If a corner and the enhancement of prices produced by buying futures directly burden interstate commerce in the article whose price is enhanced, it would seem to follow that manipulations of futures which unduly depress prices of grain in interstate commerce and directly influence consignment in that commerce are equally direct.* The question of price dominates trade between the States. Sales of an article which affect the country-wide price of the article directly affect the country-

wide commerce in it. By reason and authority, therefore, in determining the validity of this act, we are prevented from questioning the conclusion of Congress *that manipulation of the market for futures on the Chicago Board of Trade may, and from time to time does, directly burden and obstruct commerce between the States in grain, and that it recurs and is a constantly possible danger.* For this reason, Congress has the power to provide the appropriate means adopted in this act by which this abuse may be restrained and avoided.

Here was a positive finding by this court that the manipulations of grain futures for speculative profit, though not carried to the extent of a corner, exert a vicious influence and produce abnormal and disturbing temporary fluctuations of prices that are not responsive to actual supply and demand, and not only discourage justifiable hedging, but disturb the normal flow of actual consignments. It is alleged in the answer that the Sugar Exchange is organized and operated on exactly the same plan as the Chicago Board of Trade; and, as fully shown in the evidence heretofore cited, the dealings thereon are almost exclusively in margins, and great disturbances in prices have actually resulted from the manipulation on the Exchange. Therefore the finding of facts in that case, so clearly and forcefully expressed, are equally applicable in this case.

The fact that the court there had under consideration an act which was passed for the specific purpose

of regulating grain exchanges is no argument that the principle there enunciated is not equally applicable to this case. As above stated, the provisions of the Anti-Trust Act, as said by Mr. Chief Justice White in the *Standard Oil* case, are all-inclusive. They apply to every restraint upon interstate commerce, whether that restraint arises from an agreement between two individuals to do a specific thing, or whether it results from a combination having the form of an exchange. The questions are, Has a plan of operation been adopted; and if so, does the operation of such plan necessarily restrain interstate commerce? If so, it falls within the prohibitions of the Anti-Trust Act.

It may be that since the passage of the act cited, the validity of which was sustained by the court in that case, the provisions of the Anti-Trust Act do not apply to grain exchanges, as Congress has seen fit to pass an act specifically providing for their regulation. But that statute can not have the effect of limiting the scope of the Anti-Trust Act as to any part of interstate commerce not covered by its provisions.

(5) Much is said about the beneficial effects of the Exchange, but this argument is entitled to no consideration, for two reasons. First, the Government is not seeking to enjoin those transactions which are denominated by Professor Seligman as regular speculation—those which have a proper place in commercial life; and, second, as said in *Addyston Pipe*

Line Company v. *United States*, 175 U. S. 211, 241-242, "The argument that the course pursued is necessary to the protection of the retail trade and promotive of the public welfare in providing retail facilities is answered by the fact that Congress, with the right to control the field of interstate commerce, has so legislated as to prevent resort to practices which unduly restrain competition or unduly obstruct the free flow of such commerce, and private choice of means must yield to the national authority thus exerted."

SCOPE OF DECREE THAT SHOULD BE ENTERED AGAINST DEFENDANTS.

As has heretofore been indicated, the Government does not ask a decree that shall prohibit the operation of every kind of a sugar exchange, although there is certainly little need for such an organization. It insists that a decree should be entered taking one or the other of the following forms:

(1) Declare that the organization and operation of the defendants New York Coffee and Sugar Exchange (Inc.) and New York Coffee and Sugar Clearing Association (Inc.) in so far as they relate to transactions in sugar constitute a combination in violation of the Anti-Trust Act, and remand the case, directing that a decree be entered enjoining all transactions in sugar on the Exchange. This would be an adjudication only against the Exchange as now regulated and operated. And if another exchange shall be organized the burden will be upon its promoters to

see that its organization is lawful, and that it is operated in compliance with law. This in effect was the form of the decrees in the *Hardwood* and *Linseed Oil* cases.

(2) Declare that certain rules and practices of the Exchange and of the Clearing Association are violative of the Anti-trust Act, and remand to the court below, directing that a decree be entered requiring such a modification of the rules and regulations as will bring the organization within the provisions of the law, and enjoining a continuation of the improper practices, it being specifically declared by this court that all rules are unlawful which tax or in any way interfere with the delivery of sugar through the Exchange, and that it is unlawful to permit transactions on the Exchange except by an owner or grower of sugar, or one owning or renting the land upon which it is produced, or a representative of such owner or grower of sugar or owner or renter of land, and except transactions in which actual deliveries of sugar are contemplated, or which are substitutes on the Exchange for *bona fide* transactions had or contemplated outside of the Exchange made, or to be made, for the purpose of securing a sale or purchase of sugar at the price prevailing at the time of sale, or at the time of delivery. This would permit all so-called legitimate hedging upon the Exchange. Such a decree would be of the nature of those rendered in cases involving a readjustment of

the ownership of property; but apparently such a form has not been used except when property was involved.

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